87 - 1350

No.

No.

In the

Supreme Court of the United States

OCTOBER TERM 1987

O.N.E. SHIPPING, LTD.,

Petitioner,

against

FLOTA MERCANTE GRANCOLOMBIANA, S.A., ANDINO CHEMICAL SHIPPING, INC., and MARITIMA TRANSLIGRA, S.A.,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Was the Second Circuit Court of Appeals correct in applying the act of state doctrine and refusing to hear the merits in a case where the U.S. State Department has specifically refused to intervene on behalf of the foreign government on the very laws which the Circuit Court found beyond its ability to review and where there was no testimony with respect to any possible adverse diplomatic efforts?

2. Was the Second Circuit Court correct in refusing to follow, or improperly distinguishing, the law pronounced by this Court in defining the justiciability of antitrust complaints brought against companies whose anticompetitive activity was, at least in part, assisted by foreign legislation?

3. When the Federal Maritime Commission as the administrative tribunal in charge of regulating shipping has determined that investigation of foreign legislative decrees affecting shipping is an integral part of its function, should this Court refuse to hear the merits of a case involving such decrees on grounds of the act of state doctrine?

4. Should the expansion of the state compulsion doctrine as set forth in the Second Circuit Court of Appeals' decision be allowed to stand in light of this Court's pronouncement on the limited applicability of that doctrine?

5. Are the acts of a commercial enterprise found to be an agency or instrumentality of a foreign state beyond the reach of the Court's review on the grounds of the act of state doctrine?

Corporate Disclosure

O.N.E. Shipping, Ltd., is a wholly owned subsidiary of Seastriders, Inc., which is owned by private individuals. O.N.E. Shipping, Ltd., has no subsidiary or affiliated corporations.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner O.N.E. Shipping, Ltd., prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit entered in this matter.

Opinions Below

Petitioner seeks review of the opinion rendered in *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A., Andino Chemical Shipping Inc., and Maritima Transligra, S.A.*, 830 F.2d 449 (2d Cir. 1987) [p. A1] Cardamone, J., dissenting [p. A14] rehearing denied ___ F.2d ___ (November 10, 1987), [p. A40] affirming the Decisions issued May 22, 1986 and October 22, 1986 of the Southern District of New York (Duffy, J.) [p. A25, A35] and revising so

much of the Decision dated October 22, as imposed sanctions on plaintiff petitioner O.N.E. Shipping Ltd.

Jurisdictional Grounds

The opinion and judgment of the Second Circuit were decided and entered on October 1, 1987. A timely petition for rehearing and suggestion for a hearing *in banc* was denied and entered on November 10, 1987.

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S. C. § 1254(1).

Appeal to the Circuit Court of Appeals for the Second Circuit was taken pursuant to 28 U.S.C. § 1291 in that the order of the District Court in dismissing plaintiff's cause was a final order as contemplated by the statute.

Factual Background

For over ten years, O.N.E. Shipping ("O.N.E.") has been engaged in actively opposing the various attempts of Flota Mercante Grancolombiana, S.A. ("Flota"), Andino Chemical Shipping, Inc. ("Andino") and Maritima Transligra, S.A. ("Transligra") to monopolize the liquid bulk trade between the United States Gulf ports and the Atlantic and Pacific ports in the Republic of Colombia.[1] Since 1976, these three ocean shipping companies have sought

[1] The trade of specialized chemicals and edible oils carried onboard parcel tankers who transport these cargoes in bulk has been referred to herein as the "LBC" trade, as an acronym of Liquid Bulk Cargo. That term, or liquid bulk trade, or parcel tanker trade all refer to the same business which is distinguished from the crude bulk oil trade in that the ocean vessels are much more sophisticated. Although the trade does not transport the same volume as bulk petroleum, its total values are significant, amounting to over $100 million annually. In the decade 1976 to 1986 total values of cargoes shipped from the U.S. Gulf to Colombia aggregated $1.213 billion.

to have their cooperative working agreements[2] approved and sanctioned[3] by various executive and judicial tribunals in the United States. First O.N.E's opposition took the form of filing a suggestion that the agreements as filed with the Federal Maritime Commission did not constitute the entire agreements;[4] then after the FMC conditionally disapproved the agreements on May 25, 1978, as being *per se* violations of the Sherman Act,[5] O.N.E. intervened in the formal proceedings held before Administrative Law Judge Charles E. Morgan. After conducting numerous hearings over a span of five years, and consuming thousands of pages of transcripts, ALJ Morgan issued his initial Decision, reaffirmed the conditional disapproval,

[2] At first, in 1973, there was only one agreement between Flota and Andino for the entire U.S. Gulf/Colombia LBC trade. However, in 1976, the trade was broken up among the participants and the Atlantic ports were serviced by an agreement between Flota and Andino and the Pacific ports of Colombia were serviced under an agreement between Flota and Transligra. The 1973 agreement was never made public in the United States, and only the 1976 agreements were ever submitted for approval.

[3] Prior to 1984 any ocean carrier who entered into an agreement with other carriers or other persons subject to the Shipping Act of 1916 were required to file their agreements for approval [46 U.S.C. § 801, *et seq.*], and, if approved, these agreements were granted exemption from the prohibitions of the Sherman Act [15 U.S.C. 1 *et seq.*]. The Shipping Act of 1984 [Pub. L. 98-237, 98 Stat. 67] did not change antitrust culpability of parcel tanker operations, since they were specifically excepted from the 1984 Act, 46 U.S.C. 1702(6)(B).

[4] This suggestion later proved correct, when discovery conducted during the proceedings elicited that there were two agreements: one a public agreement previously filed with Colombian maritime authorities, and another a private agreement which was filed with no one, and was only filed with the FMC upon threat of dismissal of the application for approval.

[5] An Order of Investigation was entered establishing Docket 79-2 and Docket 79-3.

held the agreements *per se* violations of the Sherman Act and found that the proponents had not met their burden to show that their cooperative working agreements fulfilled a serious transportation need.[6] Again Flota, Andino and Transligra appealed, this time to the full Commission, and again O.N.E. opposed the appeal and filed its objections. The Commission (Judge Moakley dissenting) adopted and expanded the effect of the Initial Decision of the ALJ, found the cooperative working agreements to have "significant anti-competitive effects, to be contrary to the public interest and detrimental to the commerce of the United States.[7]

Significantly, the FMC rejected Flota's plea that the agreements be approved so as to avoid frustrating Colombian shipping policy:

> Secondly, there is not support in the record for Proponents' argument that the Agreements' disapproval would frustrate the intent of the sovereign state of Colombia by preventing Flota from providing a Colombian-flag liquid bulk service. Clearly, *disapproval would not preclude Flota from making ad hoc arrangements with any carrier* or vessel owner desiring to compete for Flota's cargo. (emphasis supplied)

After three determinations by U.S. shipping authorities, O.N.E. filed its antitrust complaint alleging a concerted refusal to deal, conspiracy to exclude competitors, unlawful exclusive dealing, conspiracy to fix prices, conspiracy to divide markets and allocate customers and a conspiracy to monopolize. The gravamen of plaintiff's antitrust complaint was that, by entering into the cooperative working

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[6] Docket 79-2 [Agreement 10293] at —FMC—, 22 S.R.R. 135 and Docket 79-3 [Agreement 10295].

[7] Docket 79-2; Docket 79-3 at —FMC—, 22 S.R.R. 965.

agreements, defendants Flota, Andino and Transligra as a group were able to make use of the Colombian cargo reservation scheme,[8] which none of them could have done singly. Flota did not have any Colombian flag parcel tankers, and the third flag vessels of Andino and Transligra could not become "Colombian" without the cooperative working agreement. As a group, O.N.E. alleged in its complaint, these defendants were able to fix prices, allocate markets and prevent plaintiff from entering the trade because a refusal to deal (even despite the FMC's admonition that Flota could make "ad hoc" arrangements to take the place of the disapproved agreements. Specifically, O.N.E. alleged that Flota's refusal to deal precluded O.N.E. from entering the Colombian trade under a similar cooperative working agreement which it had made with a U.S. flag carrier (Lykes Bros. S.S. Co.)

Prior to filing an answer, Flota, Andino and Transligra filed motions to dismiss for lack of subject matter jurisdiction, and for lack of jurisdiction based on international comity and plaintiff cross moved for summary judgment on the grounds of *res judicata* since all issues had been raised, litigated and adjudicated by the agency entrusted with resolution of the antitrust aspects of the shipping agreements.[9] In dismissing O.N.E.'s complaint at the pleading stage, the District and Circuit Courts both found that Flota was an "agency or instrumentality" of the Colombian government.[10] From that vantage point, the

[8] After the agreements were disapproved, the defendants recast their agreement into a joint venture under a presently operating company called Ligracol S.A.

[9] Flota, Andino and Transligra also moved to dismiss the complaint on the substantive grounds of failure to state a claim and time bar, but these issues, as plaintiff's cross motion, were never reached by the District Court in light of the jurisdictional dismissal.

[10] Appendix, page A4.

District Court went on to conclude that, *ipso dixit*, that adverse consequences in the political and/or diplomatic realm would occur if relief were granted to O.N.E. on its antitrust claim. The majority of the Second Circuit used the instrumentality finding as a springboard to the application of the "act of state" doctrine as a basis for prohibiting relief. Cardamone, J., dissented on the ground that the majority's decision to decline jurisdiction was in direct conflict with controlling Supreme Court precedents and therefore voted to reverse and remand the case to the District Court for proceedings on the merits.[11]

THE WRIT SHOULD BE GRANTED FOR THE FOLLOWING REASONS:

1. The Decision of the Majority Against Justiciability is in Direct Conflict with Two Decisions of This Court.

As the dissent filed by Cardamone, J., in this case so clearly illustrates, the majority's decision to decline antitrust jurisdiction on the grounds of the existence of foreign interests is squarely contrary to existing precedents of the Supreme Court:

> "Our highest court has twice addressed the effect of United States antitrust laws on anticompetitive conduct allegedly aided by foreign protectionist legislation. In both cases it held that such assistance did not oust federal courts from jurisdiction on comity grounds."

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[11] In addition, Cardamone, J., also found that the service of shipping is an "import" in so far as U.S. shippers competing for tonnage to Colombia are concerned. Thus, subject matter jurisdiction over O.N.E.'s complaint must prevail against attack based on the Foreign Trade Antitrust Improvements Act of 1982 [15 U.S.C. § 6a]. The majority does not touch on the issue at all in light of its decision to decline jurisdiction on comity and act of state grounds, and the District Court assumed jurisdiction under the FTAI Act due to O.N.E.'s nexus to the United States.

O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, 830 F.2d 449, 457 (2d Cir. 1987). As Judge Cardamone correctly observed, the majority's opinion was based on the cargo reservation law of Colombia and that " . . . seems to me insufficient to preclude jurisdiction under controlling Supreme Court precedents." 830 F.2d at 457.

That discriminatory legislation is seized upon by the parties to the conspiracy, will not take the anticompetive conduct out of the realm of justiciability. In *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927), a private commercial entity combined with a public agency of Mexico to make use of foreign taxing legislation to drive all competitors out of a market, leaving it to the monopolistic control of the defendant Sisal. Very much like the Colombian cargo reservation laws here involved, the Mexican taxing laws, standing by themselves, could not have effected the monopoly, nor could the private commercial banks have done so, however, by a combination of the laws and the conspiracy, a virtual monopoly was sustained.

The doctrine of act of state was very much alive when *Sisal, supra*, was decided [see, *Underhill v. Hernandez*, 168 U.S. 250 (1897); *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *Ricaud v. American Metal Co.*, 246 U.S. 304 (1918)], yet the Court never alluded to it. This could be partially due to the fact that, by bringing the action, the United States government was making a positive statement that it did not consider judicial scrutiny of the Mexican laws embarrassing; and such consideration would be consistent with our government's rejection of the Colombian request in this instance to stop the initial Federal Maritime investigation.[12]

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[12] Although the majority notes that the "Colombian Government has repeatedly made known to the United States Department of State, as well as to the Federal Maritime Commission, its strong support for the cargo reservation laws . . ." the majority neglects to note that in all instances, the United States Department did nothing to assist the government or to stop the administrative or legal proceedings. In fact the cargo reservation policies of Colombia were roundly condemned by the FMC in its findings in the proceedings of Actions to Adjust or Meet Conditions Unfavorable to Shipping in the United States/Colombia Trade, issued May 26, 1987, 52 Fed. Reg. 20119-20124.

More recently, this Court rejected an assault on its antitrust jurisdiction in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), even though the subject of the monopoly, the sale of vanadium in Canada, was controlled by a company that had been appointed by the Canadian government as its exclusive purchasing agent. In rejecting a contention that the existence of the foreign legislation mandated a declination of jurisdiction, this Court accented the fact that it was not the law but the unlawful scheme that was the touchstone of the antitrust violation.

The Circuit Court in *O.N.E. Shipping, supra,* at 453 distinguished and dismissed *Sisal* and *Union Carbide* in a footnote on the grounds that both cases only related to monopoly of domestic trade by U.S. citizens conducting their schemes in the United States. That analysis represents a distinction without a difference; in shipping, the laws keeping open competition on the seas has historically always been interpreted to aid the "third flag carriers" with substantial U.S. connections and operating in the United States trade, since their existence assists those U.S. companies that are in need of purchasing transportation services as part of their ability to compete.[13]

As noted in the dissent, the shippers of cargo to Colombia are all American, and their ability to compete against European or Asian manufacturers of the same products in the Colombian market is directly dependent upon freight rates set by the competition among carriers servicing that market.[14] Thus, the monopoly has very definite domestic

[13] See Actions to Adjust or Meet Conditions Unfavorable to Shipping in the United States/Colombia Trade, 52 Fed. Reg. 20119; Actions to Adjust, etc., United States/Peru, 52 Fed. Reg. 46356.

[14] The Federal Maritime Commission in both the initial and the final decisions found, as a fact, that the Flota, Andino and Transligra monopoly artificially raised freight rates and made it impossible for U.S. shippers to use their contracts of affreightment which they had to other Latin American countries.

effects and even the majority does not deny the existence of the direct forseeable effects test as set out in *United States v. Aluminum Co. of America,* 148 F.2d 416 (2d Cir. 1945). This case is not a case involving foreign interests entirely conducting business abroad with only casual contacts in the United States.[15]

Judicial restraint from exercising jurisdiction over conduct which involves foreign discriminatory laws has previously only been invoked under the rubric of act of state if the foreign law or political act is the causal connection between plaintiff's claim and defendants' conduct; *Hunt v. Mobil Oil Corp.,* 550 F.2d 68 (2d Cir. 1977). In this case the exclusionary conduct of Flota, Andino and Transligra would have been actionable irrespective of the existence of any legislation. The fact that the voluntary conduct derived its strength from foreign legislation does not bring the legislation itself into judicial focus. *Sisal, supra; Union Carbide, supra.* Plaintiff is not claiming that the laws of Colombia deprived it of access, since, prior to the anti-competitive association among Flota, Andino and Transligra, O.N.E. had free and unencumbered access in Colombia despite the existence of the cargo reservation laws.

2. Applying Act of State Here is Contrary to this Court's Practice to Apply it Only at the Request of the Government.

In the several cases which have employed the act of state doctrine, the Court has followed the request of the United States Executive in determining whether or not to apply the doctrine. Compare *Banco Nationale de Cuba v. Sabbatino,* 376 U.S. 398 (1964) and *First National City Bank v. Banco Nacional de Cuba,* 406 U.S. 759 (1972). See also, *Williams v. Curtiss-Wright Corp.,* 694 F.2d 300 (3d

[15] The dismissal of plaintiff's claims in *Timberlane [See Timberlane Lumber Co. v. Bank of America, N.T. & S.A.,* 549 F.2d 597 (9th Cir. 1976)] rested entirely on the fact that all the significant activities occurred in Costa Rica and it was only by chance that one of the entities was financed in the U.S.

Cir. 1982) [assuming jurisdiction in the absence of any indication by the State Department that it took a position]; *Kalamazoo Spice Extraction Co. v. Prov. Military Gov't of Soc. Ethiopia,* 729 F.2d 422 (6th Cir. 1984) [merits of dispute decided where Executive intervened asking enforcement of treaty]; *Allied Bank International v. Banco Credito Agricola,* 757 F.2d 516 (2d Cir. 1985) [reversing prior declination of jurisdiction based on the Executive's "elucidation of its position" against application of the doctrine].

In this case, rather than an administrative pronouncement in favor of abstention every overt and explicit act by the United States government has been against the application of the Act of State doctrine. Twice during the course of the Federal Maritime proceedings, the government of Colombia sought to have the State Department invoke its power to have the investigation into Colombia's discriminatory practices stopped. Twice the United States government refused the offer. Twice the administrative department responsible for overseeing shipping matters actively reviewed and soundly condemned the Colombian cargo reservation laws. The administrative laws judge and the full commission rejected sanctioning the cooperative working agreement on the grounds that the agreement was a *per se* violation of the antitrust laws and served no transportation need. Thereafter, in proceedings initiated by O.N.E. under 46 CFR 585.8 specifically asked the administration to rule that the cargo reservation laws of the Republic of Colombia were a condition unfavorable to shipping in the foreign trade of the United States. The Commission had no hesitation in fully reviewing and condemning the Colombian cargo reservation laws.[16]

[16] The Second Circuit opinion curiously notes that O.N.E. filed the application, and that O.N.E. withdrew the application without ever noting that in between the FMC threatened cancellation of the tariffs of Flota unless the discriminatory practice ceased. The proceedings were initiated by O.N.E. on the grounds that Colombia agreed to make competition of the

(*footnote continued on following page*)

This attitude of squarely confronting discriminatory legislation that affects shipping to and from the United States (irrespective of whether the vessels are United States or Third Flag), has been continually restated in Actions to Adjust or Meet Conditions Unfavorable to Shipping in the United States/Peru Trade, 52 Fed. Reg. 46,356; Actions, etc., Taiwan, 52 Fed. Reg. 46,505.

For the Second Circuit to have trepidation for stepping into an area in which the Federal Maritime Commission has no problem seems incongruous. To allow this decision to stand is to state that the courts can independently determine whether the government might be embarrassed, even against the administration's emphatic statement that it will not be embarrassed by a frontal assault on a foreign country's discriminatory shipping legislation.

3. The Majority Decision of the Second Circuit Court is in Conflict with the Third Circuit.

The Act of State defense has been historically applied only in expropriation cases where the critical acts have all taken place within the boundaries of the foreign state, and then only when the United States government has taken a position in favor of declination of jurisdiction, *Mannington Mills, Inc. v. Congoleum Corp.*, 295 F.2d 1287, 1293 (3d Cir. 1979). And since the question is not one of jurisdiction, but rather one of justiciability, the burden of proving application of the doctrine is on the party seeking to have it applied. See *Mannington Mills, supra*, at 1293:

(*footnote continued from preceding page*)
unreserved portion more freely available to competition. Furthermore, the FMC made it plain in its decision accepting withdrawal [28 Fed. Reg. 28316] that it was retaining jurisdiction to monitor further conduct by reopening the proceedings.

> "One asserting the defense [of act of state] must establish that the foreign decree was basic and fundamental to the alleged anti-trust behavior and more than merely peripheral to the overall illegal course of conduct."

The rationale for the rule is that dismissal on the grounds of act of state is not a jurisdictional dismissal, but rather a declination to exercise that jurisdiction.[17]

In *O.N.E. Shipping, supra,* at 452, 453, the Court not only made no finding of proof presented by the defendants, it merely assumed it from "reading the pleadings." Since the FMC[18] decision (a copy of which was annexed to and incorporated into the complaint) which disapproved the Flota/Andino/Transligra agreements specifically held that the monopolistic activity came about as a result of the combination of the Agreements and the Colombian law, it is difficult to perceive that finding. To the extent that the decision places the burden on O.N.E. to show the absence of an act of state, the Second Circuit's opinion runs counter to the obligations of a movant under Rule 12(b)(1) or 12(b)(6) of the Federal Rules of Civil Procedure. *Mannington Mills, supra; Bell v. Hood,* 327 U.S. 678 (1946).

4. Application of the Doctrine of Foreign Compulsion is Contrary to Accepted Authority.

This Court has stated that the test of sovereign compulsion requires either approval of anticompetitive conduct

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[17] Initially defendants brought their motion before Judge Duffy on the basis of subject matter jurisdiction under the Export Trading Company Act. *Public Laws* 97-290, 96 Stat. 1233, particularly Title IV at Foreign Trade Anti Trust Improvements Act of 1982 amended Sect. 7 of the Sherman Act, 15 U.S.C. §6a. However, that issue was disposed of by Judge Duffy in a footnote and assumed by the Second Circuit without comment. The only extensive analysis of the ETC Act is by Judge Cardamone in his dissent wherein he finds that the act does not preclude O.N.E. from bringing this litigation.

[18] Docket 79-2 & 79-3, —FMC—, 22 S.R.R. 965.

by the foreign sovereign or the imposition of a penalty for failing to observe a local law requiring the conduct. *Union Carbide, supra,* at 707. Absent such a finding, declination of jurisdiction on that ground is improper.

Although this Court did not reach the issue of sovereign compulsion in the case of *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 106 S.Ct. 1348 (1986), the issue was briefed by the government in its *amicus* brief. The test urged by the Department of Justice as to whether foreign compulsion should apply was stated as follows [Brief of the United States as Amicus Curiae Supporting Petitioners, p. 21-22]:

> "We are not prepared at this time to suggest that there is any application of the sovereign compulsion defense that would be appropriate in the absence of actual compulsion by the foreign government. *Surely the mere fact that a trade restraint is consistent with the law of a foreign national's home state is not in itself a defense to an antitrust violation.* Nor should it lightly be inferred that Congress intended to defer to foreign sovereigns to prescribe the norms for the volitional conduct of private persons concerning trade restraints directly affecting competition in the United States. This question, of course, need not be addressed by the Court until it is squarely presented in a particular factual setting." (emphasis supplied)

In light of the Second Circuit's use of foreign compulsion as the basis for dismissing an antitrust suit brought against defendants who used (but were not compelled to use) the discriminatory legislation of the Republic of Colombia, the issue is thus squarely presented in a factual setting where the Court must resolve it either as a separate defense or as part of the "balancing" of *Timberlane* or *Mannington Mills.*

CONCLUSION

The Petition for a Writ of Certiorari Should Be Granted.

Respectfully submitted,

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Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 866—August Term 1986

(Argued February 26, 1987 Decided October 1, 1987)

Docket No. 86-7988

O.N.E. SHIPPING LTD.,

Plaintiff-Appellant,

—v.—

FLOTA MERCANTE GRANCOLOMBIANA, S.A., ANDINO CHEMICAL SHIPPING, INC., and MARITIMA TRANSLIGRA, S.A.,

Defendants-Appellees.

Before:

KAUFMAN and CARDAMONE, *Circuit Judges*
and POLLACK, *District Judge**

* Hon. Milton Pollack, Senior Judge, United States District Court for the Southern District of New York, sitting by designation.

Opinion of the Court of Appeals

O.N.E. Shipping Ltd. appeals from the May 22, 1986 dismissal of its antitrust action by the United States District Court for the Southern District of New York (Duffy, J.) on the ground of lack of subject matter jurisdiction under the doctrine of international comity. It also appeals from the district court's imposition of Rule 11 sanctions.

Affirmed in part; reversed in part.

Judge Cardamone dissents in a separate opinion.

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EDWARD SCHMELTZER, Washington, D.C. (Schmeltzer, Aptaker & Sheppard, Washington, D.C., of counsel), *filed brief for Defendants-Appellees Andino Chemical Shipping and Maritima Transligra.*

POLLACK, *Senior District Judge*:

This appeal invokes the judicially created act of state doctrine on the anti-competitive effect of a foreign sovereign's cargo reservation laws—the laws of the Republic of Colombia—which require that 50% of licensed imports of liquid bulk cargo ("LBC") be transported on Colombian owned vessels, or on vessels chartered by a Colombian company.

The district court dismissed this suit brought under the Sherman Antitrust Act, 15 U.S.C. Sections 1, 2 (1982), on the ground that a federal court should not exercise jurisdiction hereof because "Colombian interests outweigh whatever antitrust enforcement interests the United States may have in this case as a matter of law." We affirm the dismissal.

Following the dismissal, appellant filed a motion under Rules 59 and 60 of the Federal Rules of Civil Procedure for reconsideration of the court's findings in light of allegedly new evidence and for an amendment of the judgment to reflect the disposition of its motion for a partial summary judgment. The court rejected the motions and sanctioned the appellant $500 under Rule 11. We reverse the order for sanctions.

BACKGROUND

In the late 1960s, Colombia passed a series of "Cargo Reservation Laws." The purpose of these laws was to favor Colombian shipping companies and the Columbian economy by requiring that imports and exports of certain types of cargo be transported exclusively by Colombian

carriers. After 1969, those laws required that the first 50% of each licensed shipment imported into Colombia on trade routes served by Colombian carriers be transported on Colombian-owned vessels or on vessels chartered by a Colombian company. As the result of a delicate compromise between the United States and Colombia, U.S. flag lines were not subject to the protection laws.

Appellant O.N.E. Shipping Ltd. ("O.N.E."), a Bermuda corporation, and its predecessor in interest, Overseas Liquid Gas, Inc., a U.S. corporation, had offered regular liquid bulk cargo tanker service from U.S. gulf ports to Central and South America. Before 1973 there were no Colombian vessels capable of carrying LBC, so shipping to Colombia of this product was unaffected by the Colombia cargo reservation laws. This situation changed in 1973 and thereafter.

Appellee Flota Mercante Grancolombiana, S.A. ("Flota"), a Colombia shipping line substantially owned by the National Federation of Coffee Growers of Colombia, is a public organization and is "an agency or instrumentality" of the Colombian Government within the meaning of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. Section 1603(b).[1] Flota is Colombia's national line. Flota had no specially equipped LBC tankers of its own.

In 1973, to accommodate the needs of Colombian importers, Flota entered into a chartering agreement (revised in 1976) with appellee Andino Chemical Shipping, Inc., a Panamanian corporation and carrier of LBC, to handle Colombia's Atlantic coast trade.

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1 By law, profits from Flota's operations are used to promote industrial development and to build warehouses, roads, schools, hospitals and power and telephone facilities.

In 1976, Flota entered into a similar chartering agreement with appellee Maritima Transligra, S.A. ("Transligra"), an Ecuadoran corporation, to charter the latter's tankers for use in Colombia's Pacific coast trade.

As required by Colombian law, Flota's chartering agreements were filed with and approved by the Colombian Government, enabling the non-Colombian tankers to receive the preferences accorded to Colombian flag vesels under the cargo reservation laws.[2] Together, the three appellees have captured up to 89% of the shipping imports of LBC into Colombia and O.N.E. has been virtually shut out therefrom.

As mentioned above, following a bilateral negotiation, no restrictions were placed by Colombia on the carriage of products imported from the United States if carried on United States flag vessels.

In April 1977, Flota, Andino and Transligra sought approval of their chartering agreements from the United States Federal Maritime Commission ("FMC") which would provide an exemption from U.S. antitrust laws. The FMC conditionally disapproved the agreements and subsequently conducted an investigation and a hearing. On May 23, 1983, the Administrative Law Judge ("ALJ") also disapproved the agreements. The ALJ found that Flota had attained near monopoly control over the LBC service to Colombia and that the agreements were prospectively unlawful. On appeal, the FMC affirmed the ALJ's order of disapproval and ruled that the agreements were anticompetitive, detrimental to United States commerce, contrary to the public interest and artificially

2 Authorization of the agreements was granted by the Director General of Maritime and Port Matters—a rear admiral in the Colombian Navy and an official within the Ministry of National Defense.

increased transportation rates. The FMC ordered appellees to cease and desist. With these rulings in hand O.N.E. brought this antitrust action in the district court below.

O.N.E. charges appellees with unlawful concerted refusal to deal, conspiracy to exclude competitors, unlawful exclusive dealing, conspiracy to fix prices, conspiracy to divide markets and allocate customers, and attempt and conspiracy to monopolize.

DISCUSSION

O.N.E.'s antitrust suit represents a direct challenge to Colombia's cargo reservation laws and to the legality of appellees' space chartering agreements under those laws. The laws were designed to promote the development of a strong Colombian merchant marine and to assist Colombia's economic development.

Among other purposes, the cargo reservation laws enable the Colombian Government to monitor the allocation of the resources of Colombian shipping companies, to determine whether particular trade routes could prove harmful to the country's economy and to consider whether an applicant would provide effective, regular and continuous service.

The Colombian Government has repeatedly made known to the United States Department of State, as well as to the Federal Maritime Commission, its strong support for the cargo reservation laws and the chartering agreements thereunder among the appellees.

Applying the balancing tests of *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th

Cir. 1976) and *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979) the district court concluded that because of Colombia's strong interest in its protectionist legislation and because of the Colombian government's ownership interest in Flota through the National Federation of Coffee Growers, there would be probable adverse effects upon our foreign relations were it to assert jurisdiction over this suit. The comity balancing test has been explicitly used in this Court. *See Joseph Muller Corp. Zurich v. Societe Anonyme de Gerance et D'Armament*, 451 F.2d 727 (2d Cir. 1971) (per curiam), *cert. denied*, 406 U.S. 906 (1972).[3]

In an effort to provide a single standard to determine whether American antitrust laws apply to a given extra-territorial transaction, Congress enacted the Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, 96 Stat. 1246 (codified at 15 U.S.C. Section 6a) [hereinafter referred to as the "Act"].

Given the dismissal on comity grounds, the district judge did not decide whether the complaint should be dismissed under the "Act", although he did state that the Act "would not appear to provide a basis for refusing to exercise jurisdiction over this action."

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3 A well-known definition of comity was enunciated by the Supreme Court:

> "Comity," in the legal sense, is neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 163-64 (1895).

Congress left it to the courts to decide when to employ notions of abstention from exercising jurisdiction in extraterritorial antitrust cases. Ninety years ago, the United States Supreme Court enunciated the American version of the act of state doctrine as follows:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

In the landmark case of *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), the Supreme Court analyzed the significant policy considerations and "constitutional underpinnings" of the doctrine, noting that no case subsequent to *Underhill* had manifested any retreat therefrom. 376 U.S. at 416, 421-23. In addition to *Sabbatino* and *Underhill*, see *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918), and *Ricaud v. American Metal Co.*, 246 U.S. 304 (1918).

In essence, the act of state doctrine is a principle of law designed primarily to avoid judicial inquiry into the acts and conduct of the officials of the foreign state, its affairs and its policies and the underlying reasons and motivations for the actions of the foreign government. Such an inquiry is foreclosed under the act of state doctrine, *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 73 (2d Cir. 1977), *cert. denied*, 434 U.S. 984 (1977); and this is true regardless of whether the foreign government is named as a party to

the suit or whether the validity of its actions are directly challenged in the pleadings. *International Ass'n of Machinists v. OPEC*, 649 F.2d 1354, 1359 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

Although the district court engaged in the broader analysis of the possible adverse effects upon foreign relations were jurisdiction to be asserted, the long established act of state doctrine calls upon courts to make a preliminary assessment, on the record before it, of "the likely impact on international relations that would result from judicial consideration of the sovereign's act." *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 520-21 (2d Cir.), *cert. dismissed*, 473 U.S. 934 (1985). This Court has made it clear that this is a legitimate exercise of an Article III court, not to be controlled by the expressed view of the executive branch in a given case. As we stated in *Allied Bank*:

> This estimation may be guided but not controlled by the position, if any, articulated by the executive as to the applicability *vel non* of the doctrine to a particular set of facts. Whether to invoke the act of state doctrine is ultimately and always a judicial question.

Id. at 521 n.2. *Cf. Republic of the Philippines v. Marcos*, 806 F.2d 344, 357-60 (2d Cir. 1986).

O.N.E. contends that the cargo reservation laws were "implemented [by Colombia] under the manipulative guidance of Flota"; that "commercially determined carrier relationships" should not be replaced by "Colombian-government dictated relationships"; that its "challenge in this proceeding does not so much address Colombia's cargo reservation laws per se as it does

appellees' manipulation of these laws"; and that Flota has "manipulate[d] the cargo reservation laws so as to carve out a monopoly for itself and exclude all competition."

O.N.E.'s allegations make clear that its antitrust suit is premised on contentions that it was harmed by acts and motivations of a foreign sovereign which the district court would be called on to examine and pass judgment on. *See International Ass'n of Machinists v. OPEC*, 649 F.2d 1354, 1358-59 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

When the causal chain between a defendant's alleged conduct and plaintiff's injury cannot be determined without an inquiry into the motives of the foreign government, claims made under the antitrust laws are dismissed. *Hunt, supra; Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 108-12 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972); *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 406-08 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984). Furthermore, where as here the conduct of the appellees has been compelled by the foreign government they are entitled to assert the defense of foreign government compulsion and the act of state doctrine is applicable.[4]

Colombia's interest in this action has not been confined to Flota itself; the liquid bulk cargo service of Flota,

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4 The agreements in question were entered into by foreign parties, approved by the government of Colombia, and relate to commerce into Colombia.

The two Supreme Court cases relied on by Judge Cardamone in his dissent, on the other hand, both related to alleged conspiracies entered

Andino and Transligra has been important to Colombia's economy, and the Colombian government has so represented.

O.N.E.'s "antitrust" claims reflect dissatisfaction with Colombia's cargo reservation laws, not with appellees' space chartering agreements. Congress, however, recognizing the particular sensitivity of such challenges to a foreign sovereign's shipping regulations, has provided a separate proceeding before the Federal Maritime Commission ("FMC") to resolve such disputes. O.N.E. itself recently instituted such a proceeding.

On May 29, 1986, O.N.E. filed a petition before the FMC under Section 19(1)(b) of the Merchant Marine Act of 1920, 46 U.S.C. Section 876(1)(b). In that proceeding, O.N.E. sought to have the FMC issue regulations under 46 CFR Part 585 to meet conditions allegedly unfavorable to shipping in the foreign trade of the United States.[5]

O.N.E.'s petition stated as follows:

> The cargo preference laws of Colombia have severely damaged O.N.E.'s financial position to the

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into in the United States by United States citizens which sought to monopolize trade in the United States. *See United States v. Sisal Sales Corp.*, 274 U.S. 268, 276 (1927); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698-99, 704 (1962).

Furthermore, the Court noted in *Continental Ore* that there was no indication of foreign government approval of the actions in question. 370 U.S. at 706.

5 46 CFR 585.8 provides that:

> Upon the filing of a petition, or on its motion when there are indications that conditions unfavorable to shipping in the foreign trade of the United States may exist, the Commission will notify the Secretary of State that such conditions apparently exist, and may request [that the Secretary] seek resolution of the matter through diplomatic channels.

> point of desperation. O.N.E. hereby asks the Commission to act immediately under Section 19 of the Merchant Marine Act of 1920, without further delay and to avoid further irreparable harm to petitioner, to suspend the tariffs of and preferential agreements by and between all Colombian carriers in this trade and/or prohibit transport of any import/export of liquid bulk products to/from Colombia/United States of America.

These allegations and claims of harm are in essence the same as those pleaded in this action. Clearly, Colombia's cargo reservation laws are alleged to be at the core of that harm. O.N.E. brought a proceeding before the FMC to remedy this alleged injury, and the mechanism invoked is one intended to preserve harmonious relations among nations while giving the injured party a possible remedy. The relevant FMC regulations stress the resolution of disputes through diplomatic channels. In these circumstances, the district court was clearly correct in concluding that courts should avoid the unnecessary irritant of a private antitrust action.[6]

The dismissal of the complaint is affirmed.

Rule 11 Sanctions

The district court imposed sanctions of $500 against appellant for bringing motions to set aside the judgment

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6 On July 17, 1987, O.N.E. withdrew its petition for relief under Section 19 of the Merchant Marine Act, 1920, then pending before the Federal Maritime Commission (FMC) and requested that the Commission proceeding be discontinued. The FMC discontinued the proceeding without prejudice.

on the basis of "newly discovered evidence" and for an amendment of the judgment entered to reflect the disposition of its motion for a partial summary judgment. The district judge ruled:

> "Plaintiff O.N.E. Shipping has requested reargument and reconsideration of my previous Memorandum and Order, dated May 22, 1986, dismissing its complaint. Reconsideration is granted, but upon reconsideration plaintiff's requests to set aside the judgment and to amend it to reflect the fact that plaintiff made a motion for partial summary judgment, and to decide that motion are denied."

Having entertained plaintiff's application for reargument on and reconsideration of the Order dismissing the complaint, there is no basis in this record for having imposed sanctions under Rule 11 on the notion that the application was frivolous, as contemplated for the imposition of sanctions.

In the circumstances, the grant of the applications made by the plaintiff was equivalent to a tacit acknowledgment that a basis existed for consideration by the court of the relief sought. Sanctions are not to be imposed for unsuccessful litigation of a cognizable claim. The failure of the court to delineate specific facts demonstrating improper use of the motion alone undermines the imposition of sanctions herein. *See Dow Chemical Pacific, Ltd. v. Rascator Maritime S.A.*, 782 F.2d 329, 344 (2d Cir. 1986).

The award of sanctions is reversed.

CARDAMONE, *Circuit Judge*; dissenting:

The question raised on this appeal is whether a federal court should exercise anti-trust jurisdiction over conduct that, aided by foreign protectionist legislation, brings about unlawful consequences in the United States. The majority says "no". Respectfully, I disagree.

Applying the balancing tests of *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976) and *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979), the district court concluded that because of Colombia's strong interest in its protectionist legislation and because of the Colombian government's ownership interest in Flota through the National Federation of Coffee Growers, there would be probable adverse effects upon our foreign relations were it to assert jurisdiction. Given its dismissal on comity grounds, the district judge did not decide whether O.N.E.'s complaint should be dismissed under the Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, 96 Stat. 1246, 15 U.S.C. § 6a (1982) (Act), though it added, without discussion, that the Act did not appear to deprive it of jurisdiction. Relying on well-settled act of state doctrine principles, the majority affirmed the district court's dismissal on comity grounds. Because I do not believe that this case should be dismissed under the Act or on comity grounds, I dissent.

A. *The Foreign Antitrust Improvements Act*

To understand Congress' purpose in this area, it is necessary to examine the 1982 Act. Section 402 of the statute provides that United States antitrust laws:

> shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce which is nor trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; . . .

15 U.S.C. § 6a (1982).

Under this statute Congress excluded from the coverage of U.S. antitrust laws conduct involving export commerce and purely foreign transactions unless such conduct has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce, import commerce or the export trade or commerce of a person "engaged in such trade or commerce in the United States." Congress aimed to clarify existing American law, and when defining the Act's scope used the phrase "commerce . . . with foreign nations", which is precisely the same terminology as that used in § 1 of the Sherman Act. 15 U.S.C. § 1 (1982). In that context, the phrase has consistently been construed to cover international transportation cases. *See, e.g., Thomsen v. Cayser*, 243 U.S. 66, 88 (1917); *United States v. Pacific & Arctic Ry. & Navig. Co.*, 228 U.S. 87, 105-06 (1913); *Joseph Muller Corp.*, 451 F.2d at 729. Thus, the Act extends to international shipping of the sort involved here.

To say that the Act applies to foreign shipping cases is not to say that it is easily applied. For t'nough shipping

goods from the United States is clearly foreign commerce, it does not fall neatly into those categories set out in the Foreign Antitrust Improvements Act. O.N.E. argues that the Act does not deprive the courts of jurisdiction over this case because the conduct alleged falls under the exception for conduct having the required effect on "export trade or export commerce . . . of a person engaged in such trade or commerce in the United States." 15 U.S.C. § 6a(1)(B). O.N.E. assumes that the service of transporting goods from the U.S. is itself "export commerce" and offers its various ties with the U.S.—for example, its U.S. parent and its U.S. derived income—as proof that it is a "person engaged in . . . [export] commerce in the United States." Appellees counter that the transactions do not fall under (1)(B) because as a non-U.S. corporation O.N.E. lacks the indicia of a "person engaged in . . . [export] commerce in the United States." Thus, appellees continue, the Act deprives the courts of jurisdiction over this case.

Both of these contentions are incorrect in several respects. First, the commerce involved here is import rather than export commerce; U.S. corporations import from foreign flag lines the service of shipping their goods from the United States to Colombia. *See Pacific Seafarers, Inc. v. Pacific Far East Lines*, 404 F.2d 804, 813 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969) ("[M]aritime nations . . . providing transportation services . . . are engaged . . . in the 'export' of shipping services."). The conclusion that the transportation at issue here is "import" rather than "export" commerce is consistent with the Act's legislative history. The drafters of the Act had as their primary concern "preserv[ing] antitrust protections in the domestic marketplace." H.R. Rep. No. 686, 97th

Cong., 2d Sess. 10, *reprinted in* 1982 U.S. Code Cong. & Admin. News 2487, 2498 (House Report). The record amply demonstrates that a market exists among United States corporations for the service of shipping LBC to Latin America. Viewed as an import, the service of transporting goods from the U.S. is not excluded by the Act from the coverage of American antitrust laws. The Act explicitly states that it does not apply to "import trade or import commerce." 15 U.S.C. § 6a.

Second, even if the shipment of LBC from the United States is "export commerce", appellees' alleged conduct is still subject to U.S. antitrust laws because it falls under the Act's exception 1(B) for conduct having a "direct, substantial, and reasonably foreseeable effect . . . on export trade . . . of a person engaged in such . . . commerce in the United States." The legislative history defines "a person engaged in [export] trade or commerce in the United States" as a person "doing business in the United States." House Report, *supra*, at 10, 12. Because Congress strongly emphasized that the Act was intended to preserve antitrust protection for the domestic market, *see* House Report, *supra*, at 9, 10, 11, and because O.N.E. participates in the domestic market for shipping services, it satisfies this "doing business" requirement.

Finally, federal courts have long taken jurisdiction over shipping services between the United States and abroad. *See, e.g., Thomsen*, 243 U.S. at 88; *Pacific & Arctic Ry. & Navig. Co.*, 228 U.S. at 101. Thus, the language of the Act and its legislative history makes it obvious that Congress did not aim to deprive federal courts of jurisdiction over suits like the instant one.

B. *International Comity Considerations and Extraterritorial Antitrust Jurisdiction*

Yet, despite Congress' aim that there be jurisdiction, the majority holds that the case should be dismissed on international comity grounds because of Colombia's significant interest in implementing its cargo reservation law. The majority suggests that U.S. and Colombian interests should be weighed in order to determine whether jurisdiction exists over O.N.E.'s complaint. The Ninth Circuit in *Timberlane*, 549 F.2d 597, and the Third Circuit in *Mannington Mills*, 595 F.2d 1287, have each set forth a list of factors[1] to be considered in determining "whether the interests of, and links to, the United States . . . are sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extraterritorial authority." *Timberlane*, 549 F.2d at 613.

1. *The Scope of Extraterritorial Antitrust Jurisdiction*

Courts have often grappled with the precise standard to be employed in determining whether American antitrust

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1 The factors enumerated in *Timberlane* are:

1. the degree of conflict with foreign law or policy,
2. the nationality or allegiance of the parties and the locations or principal places of business of corporations,
3. the extent to which enforcement by either state can be expected to achieve compliance,
4. the relative significance of effects on the United States as compared with those elsewhere,
5. the extent to which there is explicit purpose to harm or affect American commerce,
6. the foreseeability of such effect, and
7. the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

549 F.2d at 614.

law should apply to a particular extraterritorial transaction. As Judge Learned Hand wrote over 40 years ago in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (on certification from the Supreme Court), "[w]e should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States." *Id.* at 443. *Alcoa* established that in determining when Congress has chosen "to attach liability to the conduct outside the United States of persons not in allegiance to it," one must look to the effects upon U.S. commerce. *Id.* Since *Alcoa*, different formulations of the "effects" text have been advanced.

In an effort to provide a single standard to determine whether American antitrust laws apply to a given extraterritorial transaction, the Act of 1982 was passed. Con-

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The ten factors listed in *Mannington Mills* are:

1. Degree of conflict with foreign law or policy;
2. Nationality of the parties;
3. Relative importance of the alleged violation of conduct here compared to that abroad;
4. Availability of a remedy abroad and the pendency of litigation there;
5. Existence of intent to harm or affect American commerce and its foreseeability;
6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief;
7. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;
8. Whether the court can make its order effective;
9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances;
10. Whether a treaty with the affected nations has addressed the issue.

595 F.2d at 1297-98.

gress deliberately refrained from adopting *Timberlane*'s judicial balancing of the interests of the nations involved. The House Committee report, citing *Timberlane*, disclaimed any intent "to prevent [or] encourage additional judicial recognition of the special international characteristics of transactions." House Report at 13.

It was left to the courts to decide how to employ notions of international comity in extraterritorial antitrust cases. Using this grant of power, the majority concludes that jurisdiction should not be exercised on account of comity considerations and the probable adverse effect upon United States relations with the Republic of Colombia. The primary factor relied upon—Colombia's significant interest in its cargo reservation laws—seems to be insufficient to preclude jurisdiction under controlling Supreme Court precedents. Our highest Court has twice addressed the effect of United States antitrust laws on anticompetitive conduct allegedly aided by foreign protectionist legislation. In both cases it held that such assistance did not oust federal courts from jurisdiction on comity grounds.

2. *Controlling Supreme Court Precedents*

In *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927), the defendants, Comision Exportadora de Yucatan, a public agency that purchased sisal from Mexican producers, and Sisal Sales Corp., its exclusive sales agent, had utilized the discriminatory legislation of the Yucatan to monopolize the importation and sale of sisal into the United States. The legislation imposed special taxes designed to drive other purchasers out of the sisal market, leaving Comision Exportadora as the sole sisal purchaser in the Yucatan. The Supreme Court, in finding jurisdic-

tion over this conspiracy, observed: "True, the conspirators were aided by discriminating legislation, but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States. They are within the jurisdiction of our courts and may be punished for offenses against our laws." *Id.* at 276.

More recently, in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), the Supreme Court again found jurisdiction despite the role of another nation's discriminatory legislation in an alleged restraint of trade. In that case, one of the defendants, Electro Metallurgical Company of Canada (Electro Met), had been appointed by the Canadian government as the exclusive wartime purchasing agent for all of the vanadium required by Canadian industry. Plaintiff Continental Ore alleged that Electro Met, at the behest of its American parent, Union Carbide, used its position to exclude Continental Ore from the Canadian vanadium market. In finding jurisdiction, the Court relied on *Sisal Sales* stating that jurisdiction may be found "even though the defendants' control of . . . production was aided by discriminatory legislation of the foreign country which established an official agency as the sole buyer of the product . . . ." *Id.* at 705.

The Supreme Court went on to note that "[t]here is nothing to indicate that [Canadian] law in any way compelled discriminatory purchasing, and it is well settled that acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme." *Id.* at 707. It also stated that "there is no indication that . . . any . . . official within the structure of the Canadian Government approved or would have approved of joint efforts to monopolize the production

and sale of vanadium or directed that purchases from Continental be stopped." *Id.* at 706.

3. *Application of Supreme Court Precedents*

The facts before us parallel those of *Sisal Sales* and *Continental*. In both cases, the alleged restraint of trade was possible only because of the discriminatory laws of a foreign sovereign. Also, in all three cases, one of the defendants—here Flota—was found to be an agent of that sovereign. In one respect, the instant case is even more conducive to an assertion of jurisdiction than either *Sisal Sales* or *Continental*. In those cases the governments ceded a greater degree of control over the commerce in question to the defendants, while in the instant case, in contrast, Flota and its associates were not singled out for special treatment, but received preferences along with all other Colombian flag lines. Further, only 50 percent of the trade involved was set aside in the case at bar while the entire vanadium trade was restricted in *Continental*. For these reasons, this case falls squarely within the holdings of *Continental* and *Sisal Sales* and should not be dismissed on comity grounds.

In one respect this case might arguably be distinguishable from *Continental*. In that case, as noted, the Supreme Court observed that there was no evidence that Canada had approved the effort to monopolize the vanadium trade. Here, the Colombian government has expressed approval in two ways which must be considered. Colombia initially approved the agreements creating the association among the appellees, and it sent telexes to the United States State Department urging it to intervene on the appellees' behalf before the FMC.

Neither action should cause a dismissal on account of comity. The approval of the agreements are not of the type contemplated by *Continental*. In *Continental*, the Canadian government clearly "approved" of the power defendants had in the vanadium market because it had granted them that power. But the government did not express its consent to their attempt to monopolize the market. Similarly, here the initial assent by the Colombian government may have given appellees a degree of power over LBC commerce, but there is no indication that in approving the agreements Colombia considered their antitrust implications.

Nor do the telexes compel a different conclusion. Although these telexes may demonstrate some sort of official blessing of the anticompetitive effects of appellees' conduct—since they were sent after U.S. corporations had filed objections with the FMC—they should not be considered when determining jurisdiction. As Kingman Brewster, the commentator who devised the doctrine of judicial comity balancing, observed: "reliance on case-specific foreign policy concerns would create problems of fairness and consistency. . . . Disparities in rulings would . . . reward foreign governments that bellow at every threat of antitrust enforcement . . . ." 1 J. Atwood & K. Brewster, *Antitrust and American Business Abroad* § 6.18, at 175-76 (2d ed. 1981). *Cf. United States v. The Watchmakers of Switzerland Information Center, Inc.*, 1963 Trade Cas. (CCH) ¶ 70,600, at 77,456-57 (S.D.N.Y. 1962) (government approval of private activity does not deprive court of jurisdiction). Further, a consideration of these telexes in determining jurisdiction would unduly involve courts in foreign policy concerns. It is especially significant here that the United States State

Department—despite a request to do so from the Colombian government—chose *not* to intervene on appellees' behalf before the FMC. Hence, the majority's notions of comity towards Colombia should not effectively reverse the settled holdings of the United States Supreme Court.

C. *Conclusion*

In sum, despite the aid of foreign protectionist legislation, Flota and its associates' actions brought about unlawful consequences in the United States for which they should be answerable in federal court. Since the facts of the instant case fall plainly within controlling Supreme Court precedents, I must dissent from the majority's affirmance of the district court's dismissal of the complaint for want of jurisdiction on the grounds of comity and vote instead to reverse and remand the case to the district court for further proceedings on the merits.

Opinion of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

O.N.E. SHIPPING, LTD.,

Plaintiff,

-against-

FLOTA MERCANTE GRANCOLOMBIANA, S.A., ANDINO CHEMICAL SHIPPING, INC., and MARITIMA TRANSLIGRA, S.A.,

Defendants.

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84 Civ. 7825 (KTD)

MEMORANDUM & ORDER

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KEVIN THOMAS DUFFY, D.J.:

Plaintiff, O.N.E. Shipping, Ltd. ("O.N.E."), brings this action against defendants, Flota Mercante Grancolombiana, S.A. ("Flota"), Andino Chemical Shipping, Inc. ("Andino"), and Maritima Transligra, S.A. ("Transligra"), for violations of the federal antitrust laws. Defendants now move to dismiss the antitrust claims (1) pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, (2) for lack of jurisdiction based on principles of international comity, (3) pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim on which relief can be granted, and (4) as time-barred. For the reasons that follow, defendants' motion to dismiss for lack of jurisdiction based on principles of international comity is granted.

Facts

The facts, as set forth in the complaint and the affidavits submitted by the parties, are as follows. O.N.E. is a Bermudian corporation with offices in the United States. In the early 1970's, O.N.E. and its predecessor corporation regularly served ports in Central and South America, including Colombia, with shipments of liquid bulk cargo "LBC"),[1] from the United States.

Flota is a Colombian corporation with offices in New York. Apparently, Flota is an "agency or instrumentality"

of the Colombian Government within the meaning of the Foreign Sovereign Immunities Act of 1976. 28 U.S.C. § 1603(b). Andino is a foreign corporation wholly owned by Holland Chemical International and has offices in New York. Transligra is an Equadorian corporation also having offices in New York. Flota and Andino each own one-third of Transligra. Andino and Transligra are engaged in the shipment of LBC from the United States to Colombia. Ocean shipping is the primary means of transporting LBC between the United States and Colombia.

In 1969, the Colombian Government enacted a "Cargo Reservation Law" ("Reservation Law") which ultimately required that the first fifty percent of all shipments for import into Colombia be transported on Colombian owned or associated vessels or on vessels which fly the flag of the exporting country. Prior to Flota's entering the LBC trade, the market was unaffected by the Reservation Law. In 1973, Flota and Andino entered into an agreement whereby Andino would become associated with Flota so that Andino's vessels would be able to satisfy the Reservation Law. Subsequently, Andino shipped LBC under Flota bills of lading. The 1973 agreement was filed with and approved by the Colombian Government. An announcement of the agreement was made in a publication entitled *Diario Oficial* on June 8, 1973. Flota also announced its new involvement in the trade between Colombia and the United States in a publication entitled *El Tiempo*. O.N.E. alleges it did not learn of the 1973 agreement until 1980 during discovery proceedings.

In 1973, Flota and Lykes, a United States flag carrier, agreed that Lykes would have equal access to the Colombian market. An an unspecified later date, Lykes agreed with O.N.E. to issue bills of lading for LBC carried by O.N.E. Flota opposed this relationship and Lykes did not carry out its plans with O.N.E. According to plaintiff this was done because Lykes sought to preserve its relations with Flota in the trade.

On or about December 22, 1976, Flota and Andino entered into another agreement, in which Andino would ship LBC to the Atlantic coast of Colombia. Flota, Andino, and Transligra agreed that Transligra would use Andino vessels to ship LBC to Colombia's Pacific coast. Under supplemental private ageements between the parties, Flota and Transligra would issue bills of lading to shippers of LBC, and Andino would act as sole coordinator and sole supplier of tonnage in connection with all shipments originating in the United States Gulf coast.

Because LBC shipments to Colombia are relatively small and the rates vary in an inverse proportion to the size of the shipments, economies of scale dictate that shipments be consolidated and not divided. With respect to Flota, the 1973 and 1976 agreements, together with the Reservation Law, allowed it to obtain an eighty percent share of the LBC trade from the United States Gulf to Colombia.

On or about April 14, 1977, Flota and Andino sought an exemption from the antitrust laws by seeking approval by the Federal Maritime Commission ("FMC") of the 1976 agreements. The FMC initially disapproved the agreements and subsequently granted an investigation and hearing. On May 23, 1983, Administrative Law Judge ("ALJ"), Charles E. Morgan, also disapproved the agreements. On appeal, on May 30, 1984, the full FMC affirmed the decision of the ALJ. The FMC ruled that the agreements were anticompetitive, that they artificially increased transportation rates, and that they were detrimental to United States commerce. O.N.E. now charges defendants with an unlawful concerted refusal to deal, a conspiracy to exclude competitors, unlawful exclusive dealing, a conspiracy to fix prices, a conspiracy to divide markets and allocate customers, and an attempt and a conspiracy to monopolize.

Discussion

Defendants moved to dismiss plaintiff's complaint for lack of subject matter jurisdiction (1) under the Export Trading Company Act of 1982 (the "ETC Act" or the "Act"), 15 U.S.C. § 6a (1982), and (2) based on comity. Because I find that I have no jurisdiction over this action because of principles of comity, I need not decide specifically whether jurisdiction exists under the ETC Act.[2]

Courts apply principles of comity as part of either the threshold jurisdictional determination of the antitrust laws or as part of a later determination on whether to abstain from jurisdiction. *See Dominicus Americana Bohio v. Gulf & Western Industries, Inc.*, 473 F. Supp. 680, 688 (S.D.N.Y. 1979) (citing *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1294-98 (3d Cir. 1979)). In either case, there must be a balancing of the interests of the United States in asserting jurisdiction against the international implications arising from such assertion. *See Timberlane Lumber Co. v. Bank of America N.T. & S.A.*, 549 F.2d 597, 613 (9th Cir. 1977); *Dominicus Americana Bohio*, 473 F. Supp. at 687. In *Timberlane*, the Ninth Circuit set forth the following factors to consider when examining the question of comity:

> [T]he degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

549 F.2d at 614 (footnote omitted). The Third Circuit has articulated the elements to be considered as follows:

1. Degree of conflict with foreign law or policy;
2. Nationality of the parties;
3. Relative importance of the alleged violation of conduct here compared to that abroad;
4. Availability of a remedy abroad and the pendency of litigation there;
5. Existence of intent to harm or affect American commerce and its foreseeability;
6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief;
7. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;
8. Whether the court can make its order effective;
9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances;
10. Whether a treaty with the affected nations has addressed the issue.

Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d at 1297-98 (footnote omitted).

O.N.E. argues that comity does not apply under the Second Circuit's ruling in *National Bank of Canada v. Interbank Card Association*, 666 F.2d 6 (2d Cir. 1981). O.N.E., however, misconstrues *National Bank of Canada*, which did not question the propriety of refusing jurisdiction under principles of comity. *See* 666 F.2d at 8. Instead, the Court determined that jurisdiction was unavailable because plaintiff failed to show substantial effects on United States commerce. *See id.* Thus, the Second Circuit did not conclude as plaintiff contends, that once substantial effects

are shown, no further inquiry is necessary. The Court simply did not address the issue of whether to apply comity.

O.N.E., a Bermudian corporation, argues that even if comity applies, jurisdiction exists because of the substantial effects of defendants' acts on the United States and the absence of conflict between United States and Colombian law. O.N.E's strongest argument is based on the FMC's finding of anticompetitive effects of defendants' agreement on United States commerce. I find, however, that Colombian interests outweigh whatever antitrust enforcement interests the United States may have in this case as a matter of law.

The Colombian legislature enacted Colombia's Reservation Law in order to promote economic development in that country. In order to achieve the most effective application of its law, Colombia has placed significant oversight responsibilities in the office of the Director of General Maritime and Port Matters (the "Director") and in the Colombian Ministry of Economic Development ("Colombian Ministry"). For example, the Institute of Foreign Trade within the Colombian Ministry has the authority to waive the Reservation Law in order to maintain adequate service to Colombia. The defendant Flota was required to obtain approval from the Director for the privilege to serve the trade route in issue. Additionally, it should be noted that Flota is a Colombian corporation and is substantially owned by the National Federation of Coffee Growers, a public organization. Enforcement of this antitrust action would appear to adversely impact the Colombian Government's program to develop its coffee growing regions.

Based on the Colombian Government's significant ownership interest in Flota and based on Colombia's interest in implementing its Reservation Law, I find that there are probable adverse "effect[s] upon foreign relations if the court asserts jurisdiction and grants relief." *See Mannington Mills*, 595 F.2d at 1297. Were this court to grant relief,

Colombian authorities would be encouraged to disrespect analagous trade promotion laws of the United States. Enforcement of our antitrust laws to protect the interests of a foreign corporation as in this instance might also result in direct conflict with our foreign policy. If the relief sought were granted, Colombian shippers would be deterred from achieving the advantage in the trade which the Reservation Law seeks to promote and there would be no direct benefit to this country.

Finally, the fact that plaintiff and defendants are all foreign corporations weighs in favor of refusing jurisdiction. After stating that it could enforce a judgment in the United States, O.N.E. admits that it is "less certain" whether it could enforce a judgment in Colombia. O.N.E. also argues that the defendants had an explicit purpose to effect American commerce and that the defendants could foresee the harmful consequences of their action. Even taking these arguments into consideration, however, I find that the negative repercussions of granting relief in this case would far outweigh the potential benefits to United States interests. Consequently, I grant defendants' motion to dismiss for lack of jurisdiction based on principles of international comity.

I do not pass upon those parts of defendants' motion which question whether the complaint states a cause of action or whether the case is time-barred.

SO ORDERED.

DATED: New York, New York
May 22, 1986

/s/ Kevin Thomas Duffy

KEVIN THOMAS DUFFY, U.S.D.J.

FOOTNOTES

1. Liquid bulk cargo refers to liquid materials such as chemicals and vegetable oils which are usually transported in commerce by specially equipped tankers.

2. I do note that, after a cursory review of the matter, the ETC Act would not appear to provide a basis for refusing to exercise jurisdiction over this action.

The ETC Act limits antitrust jurisdiction over foreign commerce by providing that the antitrust laws:

> shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rives to a claim under the provisions of sections 1 to 7 of this title, other than this section.
>
> If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business *in the United States.*

Id. (emphasis added). Congress's general intent under the Act was both to adopt a unified standard which would exempt from the antitrust laws conduct lacking in the requisite effect on United States commerce and to help promote exports from the United States. H. Rep. No. 97-686, 97th Cong., 2d Sess. 2-3, *reprinted in,* 1982 U.S. Code Cong. & Ad. News 2487-88.

The language of the ETC Act indicates that a person whose export trade is impacted must be engaged in such trade "in the United States." The legislative history of the Act contemplates that domestic exporters have the opportunity to bring suit. 1982 U.S. Code Cong. & Ad. News at 2495-96; *see Eurim-Pharm Gmbh v. Pfizer, Inc.*, 593 F. Supp.

1102, 1106 n.5 (S.D.N.Y. 1984). The legislative history also states, and O.N.E. concedes, that the antitrust effect must impact "the export commerce of a U.S. resident." *See* 1982 U.S. Code Cong. & Ad. News at 2513-14; Plaintiff's Memo at 36. However, a foreign firm which has suffered injury to its nondomestic operations would have no remedy. 1982 U.S. Code Cong. & Ad. News at 2496.

Although it is not clear whether O.N.E. should be considered a domestic exporter for the purposes of the Act, there presently apears to be a sufficiently close factual question on this issue to preclude refusal to exercise jurisdiction on this basis alone. O.N.E. asserts, *inter alia*, that, although it is a Bermudian Corporation, it has derived 10% to 35% of its income from United States sources as defined under the Internal Revenue Code, and that it pays 10% of its annual earnings to the United States in income taxes. O.N.E. further asserts that it has offices and does business in New York, and that it advertises and secures contracts of affreightment in the United States.

Finally, O.N.E. seems prepared to show a "direct, substantial, and reasonably foreseeable effect . . . on export trade or export commerce." This impression is based primarily on the FMC's determination that defendants' actions were "contrary to the public interest" and "detrimental to the commerce of the United States."

Opinion of the District Court on Reargument

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

O.N.E. SHIPPING, LTD.,

Plaintiff,

-against-

FLOTA MERCANTE GRANCOLOMBIANA, S.A., ANDINO CHEMICAL SHIPPING, INC., and MARITIMA TRANSLIGRA, S.A.,

Defendants.

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84 Civ. 7825 (KTD)

MEMORANDUM & ORDER

APPEARANCES:

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Opinion of the District Court on Reargument

KEVIN THOMAS DUFFY, D.J.:

Plaintiff O.N.E. Shipping has requested reargument on and reconsideration of my previous Memorandum and Order, dated May 22, 1986, dismissing its complaint. Reconsideration is granted, but upon reconsideration plaintiff's requests to set aside the judgment and to amend it to reflect the fact that plaintiff made a motion for partial summary judgment, and to decide that motion are denied.

MOTION TO SET ASIDE THE JUDGMENT

Plaintiff moves to set aside my previous order pursuant to Fed. R. Civ. P. 60(b)(2) which provides for relief from an order based on "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Rule 59(b) permits such a motion "not later than 10 days after the entry of the judgment."

Plaintiff presents two pieces of "newly discovered evidence" in support of its motion. The first is the affidavit of Daniel Campbell, general manager of Overseas Shipping and Logistics of Louisiana, Inc., ("O.S.&L."), a corporation engaged in international transportation of merchandise. In his affidavit Campbell asserts that he was told that defendant Flota Mercante Grancolombiana ("Flota") was responsible for O.S.&L.'s difficulty in obtaining approval to transport machinery and equipment to Columbia. The second piece of evidence is a Report and Order by the Federal Maritime Commission, (the "Commission"), approving for an antitrust exemption, an equal access agreement between the defendant Flota and another international transport corporation.

To prevail on a motion to set aside an order based on newly discovered evidence under Rule 60(b)(2), plaintiff must meet the following five requirements:

(1) the evidence was discovered following the original proceeding;

(2) despite plaintiff's due diligence, the evidence was not discoverable in time to present it in the original proceeding;

(3) the evidence is material, admissible, and credible;

(4) the evidence is not merely cumulative or impeaching; and

(5) upon reconsideration the evidence is likely to change the outcome of the original proceeding.

Rosebud Sioux Tribe v. A & P Steel, Inc., 733 F.2d 509, 515 (8th Cir. 1984), *cert. denied*, 469 U.S. 1072 (1984); *Peacock v. Board of School Comm'rs*, 721 F.2d 210, 213-14 (7th Cir. 1983); *United States v. Walus*, 616 F.2d 283, 287-88 (7th Cir. 1980); *Johnson Waste Materials v. Marshall*, 611 F.2d 593, 597 (5th Cir. 1980).

Plaintiff learned of O.S.&L.'s complaints with Flota on June 16, 1986, and claims that it only "recently came across" the Commission's Report and Order. While Campbell's affifdavit was made after my decision on the prior motions, the Commission's Report and Order appears to have been in existence since at least 1978. Thus, although plaintiff only "recently came across" it, the Report and order should have been discovered and presented in the original motion papers.

Plaintiff simply asserts that its new evidence was discovered after my first order was entered. It presents no evidence showing that it exercised due diligence to discover the evidence in time to present it in the original proceeding. "Unexcused failure to produce the relevant evidence at the original trial can be sufficient without more to warrant denial of a Rule 60(b)[(2)] motion." *Kentucky Fried Chicken v. Diversified Packing Corp.*, 549 F.2d 368, 391 (5th Cir. 1977). This same reasoning applies as well to motions for summary judgment as to trials.

Even if plaintiff could produce satisfactory evidence to prove its due diligence, the new evidence does not support plaintiff's motion to set aside the prior order. It is difficult to imagine how Mr. Campbell's affidavit is material to this case. The affidavit offers evidence that O.S.&L. has suffered because of Flota's allegedly anti-competitive conduct. This evidence involves a party not related to this suit, and a different market and time period than those alleged in plaintiff's complaint; it is immaterial to this case. Similarly, the Commissioner's Report and Order involves an equal access agreement between the defendant and a party not involved in this suit. Unlike the agreements involved here, that agreement was approved by the Commission for antitrust exemption. It is unclear how this evidence affects plaintiff's case; indeed, it is nowhere mentioned in plaintiff's arguments in support of its motion.

Thus, plaintiff's "newly-discovered evidence," even if it was not obtainable earlier through due diligence, is immaterial to this case, and is certainly not likely to change the outcome of my original decision. Therefore, plaintiff's motion to set aside the judgment based on newly discovered evidence is denied.

MOTION TO AMEND THE JUDGMENT

Plaintiff also moves to amend the judgment entered in this case to reflect the disposition of its motion for a partial summary judgment. Plaintiff's complaint was dismissed for lack of jurisdiction based on the doctrine of international comity. Absent jurisdiction, an Article III judge has no power to determine summary judgment motions. Therefore, plaintiff's motion pursuant to Fed. R. Civ. P. 59(e) to amend the judgment to reflect the fact that it made a motion for partial summary judgment, and to decide that motion, is denied.

Rule 11 sanctions will be imposed in the amount of $500 against the movant-plaintiff, as partial payment of attorney's fees for defense counsel in defending this motion.

Dated: New York, New York
October 22, 1986

/s/ Kevin Thomas Duffy

KEVIN THOMAS DUFFY, U.S.D.J.

Judgment of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

O.N.E. SHIPPING, LTD.,

Plaintiff,

-against-

FLOTA MERCANTE GRANCOLOMBIANA, S.A., ANDINO CHEMICAL SHIPPING, INC., and MARITIMA TRANSLIGRA, S.A.,

Defendants.

---

84 Civ. 7825 (KTD)

JUDGMENT

Defendants having moved to dismiss pursuant to Rule 12(b)(1) and 12(b)(6), Fed.R.Civ.P., and the said motion having come before the Honorable Kevin Thomas Duffy, U.S.D.J., and the Court thereafter on May 23, 1986, having handed down its Memorandum & Order granting defendants' motion to dismiss for lack of jurisdiction, it is

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed.

DATED: NEW YORK, NEW YORK
May 29, 1986

/s/ Raymond F. Burghardt

CLERK

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON 05-29-86.

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the tenth day of November one thousand nine hundred and eighty-seven.

O.N.E. SHIPPING, LTD.,

Plaintiff-Appellant,

-v.-

FLOTA MERCANTE GRANCOLOMBIANA, S.A., ANDINO CHEMICAL SHIPPING, INC., and MARITIMA TRANSLIGRA, S.A.,

Defendants-Appellees.

No. 86-7988

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by plaintiff-appellant, O.N.E. Shipping Ltd.,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
Elaine B. Goldsmith,
Clerk

No. 87-1350

IN THE

Supreme Court of the United States

October Term, 1987

O.N.E. SHIPPING LTD.,

Petitioner,

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A., ANDINO CHEMICAL SHIPPING, INC., and MARITIMA TRANSLIGRA, S.A.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Statement Pursuant to Rule 28.1

Respondents have no parent, subsidiary or affiliate whose securities are publicly traded.

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IN THE

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O.N.E. SHIPPING LTD.,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Proceedings Below

On May 22, 1986, the District Court for the Southern District of New York (Duffy, J.) dismissed this private antitrust action of petitioner O.N.E. Shipping Ltd. ("O.N.E.") on the basis of principles of international comity. The District Court concluded that the Colombian government's compelling interest in the welfare of its national flag line, respondent Flota Mercante Grancolombiana, S.A. ("Flota"), and its interest in implementing its

cargo reservation laws in order to promote economic development in Colombia, far outweighed any potential United States interests furthered by this private antitrust suit between foreign parties.

On October 1, 1987, the Court of Appeals for the Second Circuit affirmed dismissal on the grounds of comity. 830 F.2d 449. The Court emphasized that the suit was a frontal attack on a Colombian statute, and it gave particular emphasis to "act of state" considerations in its comity analysis. The Court found that O.N.E.'s antitrust claims were premised on the contention that O.N.E. had been harmed by official acts of the Colombian government, and that those claims could not be resolved without probing and passing judgment on the conduct and motivations of a foreign sovereign. The Court concluded that the District Court was "clearly correct" in dismissing O.N.E.'s antitrust suit.

Statement of Facts

A. Introduction

The parties to this action are all foreign corporations that compete in the export of liquid bulk cargo from the United States Gulf Coast to the Atlantic and Pacific Coasts of Colombia.* As the Court of Appeals stressed, "O.N.E.'s antitrust suit represents a direct challenge to Colombia's cargo reservation laws and to the legality of appellees' space chartering agreements under those laws." 830 F.2d at 451.

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* Petitioner O.N.E. is a Bermuda corporation. Respondents Flota, Andino Chemical Shipping, Inc. ("Andino") and Maritima Transligra, S.A. ("Transligra") are Colombian, Panamanian and Ecuadorian corporations, respectively.

B. Colombia's Cargo Reservation Laws

Colombia's cargo reservation laws "were designed to promote the development of a strong Colombian merchant marine and to assist Colombia's economic development." *O.N.E. Shipping*, 830 F.2d at 451. During the period at issue in this case, the laws required that the first 50 percent of each licensed shipment imported into Colombia on trade routes served by Colombian carriers be transported on Colombian-owned vessels, or on non-Colombian vessels chartered by a Colombian company. The non-reserved 50 percent could be transported by any carrier of any country. United States flag ships enjoyed a preferred "associate" status under the cargo reservation laws and were free to carry liquid bulk cargo to Colombia without regard to any percentage requirement.

The cargo reservation laws also established a complex administrative mechanism to: (1) monitor the quality of ocean transportation services available to Colombian importers; (2) ensure that the resources of Colombian shipping companies were well employed; and (3) grant requests for waivers of the cargo reservation laws when Colombian-flag or Colombian-associated vessels were unable to accommodate the traffic on a route they had been authorized to serve.

C. The Critical Importance to Colombia of Flota and Its Participation in the Liquid Bulk Cargo Import Trade

Flota, a Colombian corporation and the national flag line, was formed in 1946 with funds provided, in large part, by the National Coffee Fund ("the Fund"). The Fund was established by the Colombian government to assist in

the growth and development of the Colombian coffee industry and to promote public works, such as the construction of roads, schools and hospitals, in Colombia's coffee growing regions. The Fund is administered by the National Federation of Coffee Growers, which today holds 74.3 percent of Flota's stock in a quasi-public capacity as administrator of the National Coffee Fund. By law, profits from Flota's operations attributable to this stock must be returned to the Fund, the assets of which can be used only for public purposes.

In the early 1970's Colombia's industrial development was severely hindered by the lack of a reliable transporter of liquid bulk commodities. Flota, as the national line of Colombia, felt a special obligation to accommodate the needs of Colombian importers of liquid bulk cargo, but had neither the equipment nor the expertise necessary to operate parcel tankers. To meet Colombia's needs, Flota ultimately entered into space chartering contracts with respondents Andino and Transligra, foreign corporations that had the technical expertise and appropriate vessels to operate this specialized service.

These space chartering contracts, which O.N.E. contends violated United States antitrust laws, could not have been implemented without the advance permission and continuing supervision of the Colombian government. The resolution granting that approval specifically conditioned it on Flota's continued compliance with the requirements of the cargo reservation laws. Among other things, Flota was obligated to provide effective, regular, and continuous service in the liquid bulk trade between the United States and Colombia, including handling the smaller, less profit-

able shipments characteristic of the trade which were shunned by other carriers. Flota was also required to submit to the maritime authorities detailed reports of the service provided.

"The Colombian Government has repeatedly made known to the United States Department of State, as well as to the Federal Maritime Commission, its strong support for the cargo reservation laws and the chartering agreements thereunder among the appellees." *O.N.E. Shipping*, 830 F.2d at 451.

D. O.N.E.'s Remedies Before the Federal Maritime Commission

The focus of O.N.E.'s "factual" presentation to this Court is a summary of the various proceedings before the Federal Maritime Commission ("FMC") which preceded this lawsuit. O.N.E. ignores, however, the significance of its own petition under Section 19(1)(b) of the Merchant Marine Act of 1920, which O.N.E. filed with the FMC after beginning this lawsuit. That petition set forth essentially the same claims pleaded in this action. The relevant FMC regulation governing that proceeding stresses the resolution of such disputes through diplomatic channels.*

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* The pertinent regulation, 46 CFR 585.8, provides that:

> Upon the filing of a petition, or on its motion when there are indications that conditions unfavorable to shipping in the foreign trade of the United States may exist, the Commission will notify the Secretary of State that such conditions apparently exist, and may request [that the Secretary] seek resolution of the matter through diplomatic channels.

Following O.N.E.'s filing of its Section 19 petition and the FMC's issuance of a proposed rulemaking, there were intensive discussions between representatives of the United States and Colombia. These discussions resulted in a diplomatic resolution of the matter and O.N.E. withdrew its petition.

As the Court of Appeals explicitly recognized in affirming dismissal of O.N.E.'s suit, the mechanism O.N.E. invoked before the FMC is "one intended to preserve harmonious relations among nations while giving the injured party a possible remedy." 830 F.2d at 453. In these circumstances, "courts should avoid the unnecessary irritant of a private antitrust action." *Id.* at 454.

ARGUMENT

The Questions Presented By Petitioner Do Not Warrant Supreme Court Review

I. There Is No Conflict With This Court's Decisions

O.N.E. argues that dismissal of its antitrust suit is contrary to this Court's decisions in *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962) and *United States* v. *Sisal Sales Corp.*, 274 U.S. 268 (1927). That contention lacks merit.

1. The plaintiff in *Continental Ore*, a U.S. corporation, alleged that defendants had conspired to monopolize the United States vanadium industry. As part of this conspiracy, defendant Electro Met, a Canadian company acting under the control and direction of its U.S. parent (Union Carbide), precluded plaintiff from selling vanadium in Canada and divided plaintiff's former Canadian customers among defendants. Electro Met was in a position to effect the "Canadian component" of the conspiracy because, as part of Canada's wartime measures, it had been appointed the exclusive wartime agent for the purchase and allocation of vanadium for use in Canadian industries.

Apart from appointing Electro Met as the wartime vanadium purchasing agent, the Canadian government was not alleged to have played any role whatsoever in the elimination of plaintiff from the Canadian vanadium market, nor did plaintiff question the validity of Canada's wartime measures or any action undertaken by the Canadian government. *Id.* at 702 n.11 and 706. The Court in *Continental Ore* explicitly found that:

> [T]here is no indication that the [Canadian Metals] Controller or any other official within the structure of the Canadian Government approved or would have approved of joint efforts to monopolize the production and sale of vanadium or directed that purchases from Continental be stopped.

Id. at 706.

Moreover, the Court found "nothing to indicate that [Canadian] law in any way compelled discriminatory purchasing." *Id.* at 707. Thus, unlike this case, there was no need for the district court to examine or pass judgment on the acts and motivations of the Canadian government in order to determine the causal connection between Continental's injury and defendants' alleged anticompetitive conduct. In these circumstances, the act-of-state doctrine is inapplicable.

An assertion of U.S. antitrust jurisdiction in *Continental Ore* was also supported by principles of international comity. In contrast to the significant legal and economic interests of Colombia and the minimal U.S. interests implicated in O.N.E.'s lawsuit, United States antitrust concerns far outweighed any potential Canadian interests in the *Continental Ore* case. All plaintiffs and defendants in *Continental Ore*, with the exception of one wholly-owned

Canadian subsidiary of a U.S. corporation, were United States corporations engaged in the mining, manufacturing and selling of vanadium products in the United States. The conspiracy was entered into, directed from, and, for the most part, implemented in the United States and had as its objective monopolization of the U.S. vanadium industry. In addition, as the Court expressly noted in *Continental Ore*, the sole Canadian defendant had never been served and therefore could not be held liable for damages.

2. *Sisal Sales* is equally factually distinct from this case. First, *Sisal Sales* was not a private antitrust suit but rather an action brought by the United States government to enjoin violations of the antitrust laws committed within the United States. All defendants, with the exception of one Mexican company, were U.S. corporations engaged in business within the United States. The alleged conspiracy was "entered into by the parties within the United States"; was "made effective by acts done therein"; and had as its objective monopolization of the United States sisal market. 274 U.S. at 276.

Although, as in *Continental Ore*, the *Sisal* conspirators derived assistance in implementing their scheme from a foreign government's legislation, that legislation was not the explicit or implicit gravamen of the complaint. The district court in *Sisal* was not required to pass judgment on the public acts of the Mexican government in order to determine the causal connection between the antitrust violations alleged and defendants' conduct. Moreover, the interests of the United States in asserting antitrust jurisdiction outweighed any Mexican legal or economic interests implicated in the lawsuit.

In sum, the analyses undertaken by the District Court and the Court of Appeals in dismissing O.N.E.'s lawsuit are entirely consonant with this Court's rationale in both *Continental Ore* and *Sisal Sales*.

3. The different outcome in this case is a result of strikingly different factual circumstances. As the Court of Appeals recognized, the act of state doctrine bars the type of inquiry that would be called for in this case to determine whether, as O.N.E. asserts, its alleged antitrust harm resulted from Flota's "manipulation" of the cargo reservation laws and its inducement of the Colombian government to help respondents achieve their anticompetitive objectives, or simply from the autonomous operation of the cargo reservation system.

O.N.E.'s allegations make clear that its antitrust suit is squarely premised on the claim that it was harmed by respondents' manipulation of, or complicity with, the Colombian Government. It has stated in the Court of Appeals, for example, that the cargo reservation laws were "implemented [by Colombia] under the manipulative guidance of Flota"; that "Flota's ability to manipulate the cargo reservation laws is enhanced by the fact that the Colombian Government has abdicated its 'oversight' responsibility to Flota"; and that Colombia's port authority confers with Flota in determining whether to issue permits to non-Colombian carriers. *See O.N.E. Shipping*, 830 F.2d at 452. Accordingly, an assertion of U.S. jurisdiction would violate the act-of-state principles enunciated by this Court—that is, the district court would be called upon to examine and pass judgment on the public acts of a foreign sovereign within its own territory.

II. There Is No Conflict Among The Circuits

O.N.E.'s contention that the decision of the Court of Appeals is contrary to the Third Circuit's decision in *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287 (2d Cir. 1979) is perplexingly wrong.* Indeed, the Court in *Mannington Mills* expressly endorsed comity interest balancing as an appropriate analytical framework for determining the advisability of asserting United States anti-trust jurisdiction when foreign interests are involved. *Id.* at 1294-98.

The "conflict" O.N.E. perceives with *Mannington Mills* appears to be premised on a fundamental misreading of that case. According to O.N.E., the decision of the Second Circuit runs afoul of *Mannington Mills* by placing an improper burden on O.N.E. "to show the absence of an act of state", rather than requiring respondents to "establish that the foreign decree was basic and fundamental to the anti-trust behavior. . . ." O.N.E.'s Pet. at 12, quoting *Mannington Mills*, 595 F.2d at 1293. The excerpt relied on by O.N.E. to support its argument is as follows:

> One asserting the defense [of act of state] must establish that the foreign decree was basic and fundamental to the alleged anti-trust behavior and more than merely peripheral to the overall illegal course of conduct.

Id.

In fact, contrary to O.N.E.'s bracketed insert, the quoted statement does *not* refer to the act of state doctrine, but occurs in an entirely separate discussion of the defense of "foreign compulsion," which the Court explicitly describes

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* The citation to *Mannington Mills* contained in O.N.E.'s petition is erroneous. The correct cite is as above.

as a "conceptually distinct" defense. 595 F.2d at 1293. O.N.E.'s alteration of the quote to suit its own purposes is misleading and plainly incorrect.

The Third Circuit's discussion of the act of state doctrine, on the other hand, is fully consistent with the Second Circuit's decision in this case. As stated in *Mannington Mills*:

> [T]he [act of state] doctrine requires American courts to reject private claims based on the contention that the damaging act of another nation violates either American or international law.

595 F.2d at 1292-93.

As the Court of Appeals concluded, O.N.E.'s allegations of antitrust harm are "premised on contentions that it was harmed by acts and motivations of a foreign sovereign which the district court would be called on to examine and pass judgment on." 830 F.2d at 452. In such circumstances, the Third Circuit would support dismissal of O.N.E's antitrust claims.

III. Application Of The Act Of State Doctrine Does Not Depend Upon The Views Of The Executive Branch, Which In Any Event Has Been Silent In This Case

O.N.E.'s final ground for seeking Supreme Court review is the alleged insensitivity of the Court of Appeals to what O.N.E. characterizes as the "overt and explicit" opposition of the Executive Branch to application of the act of state doctrine in this case. O.N.E. asserts that the act of state doctrine is to be employed by courts "only at the request of the government", and that the Supreme Court has con-

sistently "followed the request of the United States Executive in determining whether or not to apply the doctrine." O.N.E.'s Pet. at 9. O.N.E. is wrong. As the Court of Appeals stated, "whether to invoke the act of state doctrine is ultimately and always a judicial question." 830 F.2d at 452.

Even if O.N.E.'s novel legal position were correct, the Executive Branch has never expressed to any court in this case its views regarding abstention on act of state grounds. It is fantasy for O.N.E. to infer Executive Branch opposition to application of the comity doctrine from Executive Branch silence in the courts below.

In *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), the Court confirmed that abstention on act of state grounds is a uniquely judicial determination premised on the relationships and differing competencies of the three branches of government. It found the act of state doctrine to be applicable despite the fact that the U.S. State Department had declared the Cuban decree at issue in *Sabbatino* to be "manifestly in violation of . . . international law," *id.* at 402, and had "nowhere alleged that adjudication of the validity of the Cuban decree . . . would embarrass our relations with Cuba or impede settlement on an international level." *Id.* at 463 (White, J., dissenting).

Conclusion

There is nothing in this case justifying further review. Accordingly, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 87-1350

In the Supreme Court of the United States

OCTOBER TERM, 1988

O.N.E. SHIPPING, LTD., PETITIONER

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the act-of-state doctrine was properly invoked to dismiss a private antitrust case in which the alleged conspiracy depended for its success on the existence of foreign legislation, but the court below failed to identify any respect in which the plaintiff's claim necessarily constituted a challenge to the validity of any act of a foreign government.

2. Whether there is an exception to the act-of-state doctrine for the acts of a commercial enterprise that is the agency or instrumentality of a foreign government.

3. Whether the foreign sovereign compulsion doctrine provides any basis for the dismissal of the complaint.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner O.N.E. Shipping, Ltd., a Bermudan corporation with offices in the United States, transports liquid bulk cargo (LBC) [1] by ship between the United States and ports in Central and South America. The three respondents are also foreign shipping companies with offices in the United States. Flota Mercante Gran-

[1] Liquid bulk cargo includes various liquid chemicals, fats, and oils. These cargoes are usually transported in international commerce in specially equipped "parcel" tankers, designed to carry diverse liquid products with minimal risk of contamination of one by another. Ocean shipping is the primary means of transporting LBC between the United States and Colombia.

colombiana, S.A. (Flota), is a Colombian corporation substantially owned by the National Federation of Coffee Growers of Colombia in its capacity as administrator of the National Coffee Fund. Andino Chemical Shipping, Inc. (Andino), is a Panamanian corporation wholly owned by Holland Chemical International. Maritima Transligra, S.A. (Transligra), is an Ecuadoran corporation owned in part by Flota and Andino. Pet. App. A4, A26-A27.

Certain Colombian government decrees issued in 1969 as part of a program to develop and promote a national-flag merchant marine, known as the Reservation Laws, favor Colombian-flag vessels in the import and export trade. As subsequently modified, those decrees reserve 50% of Colombian general import and export cargo to Colombian-flag vessels or "associated" vessels (vessels of foreign-flag carriers that have entered into pooling and other agreements with a Colombian carrier). Pet. App. A27. The Reservation Laws initially did not affect LBC exports from the United States to Colombia, because no Colombian-flag carriers served the trade.[2] Flota, although a Colombian-flag carrier, had no suitable tankers. The trade was handled by various carriers, including petitioner and Andino.

The Reservation Laws first affected the U.S.-Colombian LBC trade in 1973, when, petitioner alleges, Andino induced Flota to petition the Colombian government for exclusive Colombian carrier rights in the LBC trade, to be served through space-chartering arrangements on Andino's vessels (O.N.E. C.A. Br. 11). Flota and Andino did enter into chartering agreements, and the Colombian Director General of Maritime and Port Matters approved application of the Reservation Laws to LBC carried between the United States and Colombian ports on Andino's

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[2] According to the court of appeals (Pet. App. A4, A5), U.S.-flag vessels are not subject to the Reservation Laws' restrictions. However, no U.S.-flag carriers served the trade either.

non-Colombian-flag vessels under those agreements.[3] In 1976, Flota entered into similar agreements with Transligra and accordingly modified its agreements with Andino (Pet. App. A4-A5). Following those agreements, Flota—acting through its non-Colombian associates—captured up to 89% of the business of carrying LBC into Colombia (*id.* at A5).[4] Petitioner no longer shared any portion of the trade.

In 1977, respondents sought Federal Maritime Commission (FMC) approval of the 1976 agreements, pursuant to Section 15 of the Shipping Act of 1916, 46 U.S.C. (& Supp. III) 814. FMC approval would have provided an exemption from the U.S. antitrust laws. The FMC in 1984 found that the agreements were anticompetitive, artificially increased transportation rates, and were detrimental to United States commerce (Pet. App. A5-A6, A28). It therefore disapproved the agreements and ordered respondents to cease and desist implementing them.

2. Shortly after the FMC decision, petitioner brought an action against respondents in the United States District Court for the Southern District of New York, alleging violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2. Petitioner charged respondents with unlawful concerted refusal to deal, conspiracy to exclude competitors, unlawful exclusive dealing, conspiracy to fix

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[3] The functions and powers of the Director General of Maritime and Port Matters include "[a]pprov[ing] or disapprov[ing] freight agreements executed by the Colombian ship owners and transportation associations and agreements, based on equality or reciprocity of treatment for Colombian ship owners and directed at the economic and operative streamlining of their traffic," and "[r]eceiv[ing] and handl[ing] applications submitted by Colombian ship owners for the application of the provisions of the laws concerning cargo reserves" (Decree 2349, art. 3, ¶¶ 13, 19, in translation).

[4] Flota's market share was well above the 50% Colombian cargo reservation. The district court explained that economies of scale lead to consolidation rather than division of the small shipments characteristic of the trade (Pet. App. A28).

prices, conspiracy to divide markets and allocate customers, and attempt and conspiracy to monopolize.[5]

The district court dismissed the action, holding that it had "no jurisdiction * * * because of principles of [international] comity" (Pet. App. A29).[6] The court viewed the analysis of international comity as a matter of "balancing of the interests of the United States in asserting jurisdiction against the international implications arising from such assertion" (*ibid.*), under the principles set forth in *Timberlane Lumber Co.* v. *Bank of America N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976), and *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979).

The court noted petitioner's claims of substantial effects on the United States and of an absence of conflict between U.S. and Colombian law, as well as the FMC's finding of anticompetitive effects. But it stated that it "f[ound] * * * that Colombian interests outweigh what-

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[5] Those allegations were not fully specified in petitioner's complaint but instead were elaborated in subsequent pleadings. Petitioner alleged that Flota's intent to monopolize was shown by its opposition to implementation of an agreement between petitioner and a U.S.-flag carrier, Lykes Bros. Steamship Co., that would have permitted petitioner to carry LBC as an associated carrier of Lykes. The Lykes agreement was never implemented. See Pet. App. A27.

[6] The district court briefly addressed, without deciding, whether subject-matter jurisdiction was lacking under the Foreign Trade Antitrust Improvements Act of 1982 (FTAI Act), 15 U.S.C. 6a (Title IV of the Export Trading Company Act of 1982, Pub. L. No. 97-290, 96 Stat. 1246 (the ETC Act)), which limits antitrust jurisdiction over foreign commerce to conduct with a direct, substantial, and reasonably foreseeable effect on certain aspects of that commerce. The court noted, "after a cursory review of the matter, the ETC Act would not appear to provide a basis for refusing to exercise jurisdiction over this action" (Pet. App. A33 n.2). The court did not address whether the complaint stated a cause of action or whether the case was time-barred (*id.* at A32).

ever antitrust enforcement interests the United States may have in the case as a matter of law" (Pet. App. A31). The court found that the purpose of the Reservation Laws was to promote economic development. The court also noted the role of certain Colombian government agencies in regulating shipping and cited Flota's links to the Federation. The court then concluded that "[e]nforcement of this antitrust action would appear to adversely impact the Colombian Government's program to develop its coffee growing regions." *Ibid.*

The court further concluded that assertion of jurisdiction and the granting of relief might have adverse effects on foreign relations because of the Colombian government's "significant ownership interest in Flota and based on Colombia's interest in implementing its Reservation Law" (Pet. App. A31).[7] It stated (*id.* at A31-A32):

> Were this court to grant relief, Colombian authorities would be encouraged to disrespect analagous [*sic*] trade promotion laws of the United States. Enforcement of our antitrust laws to protect the interests of a foreign corporation as in this instance might also result in direct conflict with our foreign policy. If the relief sought were granted, Colombian shippers would be deterred from achieving the advantage in the trade which the Reservation Law seeks to promote and there would be no direct benefit to this country.

3. Petitioner appealed, arguing principally that the district court's proper role at this stage of the case was only to determine whether the allegations of the complaint showed a direct, substantial, and reasonably foreseeable anticompetitive effect on U.S. commerce (C.A. Br. 20-29) and that it was improper for the district court, in the name of "comity," to balance U.S. and foreign interests

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[7] The district court had not sought the views of the Executive Branch concerning any possible effect of this lawsuit on foreign relations, nor did the court of appeals subsequently seek the views of the United States.

in order to decide whether to entertain the lawsuit (*id.* at 30-42). In making that argument, petitioner appeared to assert that a U.S. antitrust court could and should explicitly condemn the Colombian government's cargo reservation laws and its implementation of them (*id.* at 29).[8] Petitioner also asserted briefly that, even under a balancing approach, it was improper for the district court to dismiss the lawsuit (*id.* at 42-44).

Respondents advanced numerous arguments in support of the district court's judgment. Among other things, respondents argued that, "[a]lthough [the district court] did not expressly characterize * * * [its] analysis as an act-of-state inquiry, the act-of-state implications of an assertion of U.S. jursidiction are an essential feature of the comity balancing test" (Flota C.A. Br. 30) and that "[t]he Second Circuit's decision in *Hunt* v. *Mobil Oil*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977), fully supports, under the act-of-state rubric, [the dis-

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[8] Specifically, petitioner's brief argued (C.A. Br. 29):

> The exclusion of non-national-flag/non-associate carriers [by the Reservation Laws], and severe restrictions imposed on such lines[,] has [*sic*] to date has [*sic*] and will continue to foreclose commercially-determined shipper-carrier relationships, and has replaced those relationships with Colombian Government-dictated relationships. * * * Colombian law, as promulgated, and as manipulated by Flota, has eliminated services which U.S. shippers have found desirable * * * and which third-flag carriers such as [petitioner] have previously offered.
>
> U.S. shipping and antitrust policy are integral parts of U.S. trade policy and must not be dictated by trading partners, by means of cargo reservation laws. Where the interests of U.S. exporters and ocean carriers * * * and overall U.S. commerce are at stake, and where a foreign government seeks to enforce a concept which runs counter to the U.S. principle of non-protectionist, free and fair access to trades, and actions are taken in furtherance of the concept, which limit the availability of shipping services and inhibit the flow of commerce, the anticompetitive effect on United States' [*sic*] commerce and the necessity of taking jurisdictionis [*sic*] beyond cavil.

trict court's] dismissal of [petitioner's] antitrust suit" (Flota C.A. Br. 32). Respondents contended that petitioner's "antitrust suit is squarely premised on the claim that it was harmed by appellees' manipulation of, or complicity with, the Colombian government" and therefore should be dismissed under the act-of-state doctrine (*id.* at 34).

Petitioner's principal reply to respondents' act-of-state argument was an assertion that it was not properly before the court of appeals (C.A. Reply Br. 15-16). Petitioner added that "the act of state defense would not be available if [petitioner] demonstrates, as alleged, that [respondents'] manipulation of the Colombian cargo reservation laws was part of a broader restraint of trade and monopolistic scheme" (*id.* at 16).

4. A divided court of appeals affirmed, but without either adopting or rejecting the district court's reasoning. The court briefly summarized the district court's comity balancing analysis (Pet. App. A6-A7), but it did not in terms rest its affirmance on principles of comity. Instead, it stated that judicial inquiry into "the acts and conduct of the officials of the foreign state, its affairs and its policies and the underlying reasons and motivations for the actions of a foreign government" is "foreclosed under the act of state doctrine" (*id.* at A8). Because, in the court's view, petitioner's claims were "premised on contentions that it was harmed by acts and motivations of a foreign sovereign" (*id.* at A10) and because the "causal chain between [respondents'] alleged conduct and [petitioner's] injury cannot be determined without an inquiry into the motives of the foreign government" (*ibid.*), dismissal was appropriate.

Although Flota had not contended that it was an instrumentality of a foreign sovereign and the district court had concluded only that Flota "[a]pparently" had that status (Pet. App. A26), the court of appeals observed in passing that Flota was " 'an agency or instrumentality' of the Colombian Government within the

meaning of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. Section 1603(b)" (Pet. App. A4 (footnote omitted)).[9] The holding of the court of appeals was apparently not based on that observation, however. The court did not inquire whether Flota is immune from the jurisdiction of United States courts (see 28 U.S.C. 1604), or whether an exception to sovereign immunity applies (see 28 U.S.C. 1605). Nor did it consider whether Flota had been invested with sovereign authority (see *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 691-693 (1976) (opinion of the Court)), or whether there is an applicable "commercial exception" to the act-of-state doctrine (see *id.* at 695-706 (opinion of White, J.)).

In addition, although the district court had not found, nor had respondents contended, that any of respondents' alleged conduct had been compelled by any government, the court of appeals also observed in passing that "where as here the conduct of the [respondents] has been compelled by the foreign government they are entitled to assert the defense of foreign government compulsion" (Pet. App. A10). The court of appeals did not specify, however, the conduct it considered to have been compelled or its relation to petitioner's claim. Finally, the court noted that petitioner had available, and had invoked, an alternative remedy for its "dissatisfaction with Colombia's cargo reservation laws" (Pet. App. A11)—a separate proceeding before the FMC.[10]

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[9] Indeed, Flota's own court of appeals brief (at 35) characterized Flota as a "private corporation" the majority of whose stock is held by the Federation in a "quasi-public capacity."

[10] The court referred (Pet. App. A11, A12 n.6) to a petition filed in 1986 before the FMC under Section 19(1)(b) of the Merchant Marine Act of 1920, 46 U.S.C. (& Supp. III) 876(1)(b). Under that provision, the FMC is empowered to adopt regulations to meet unfavorable conditions in shipping attributable to foreign laws or to the competitive methods or practices of owners or operators of foreign vessels. Although the petition did not result

Judge Cardamone dissented. He explained that he understood the majority to have affirmed the dismissal on comity grounds, "relying on well-settled act of state doctrine principles" (Pet. App. A14). In his view, however, neither comity principles nor the FTAI Act justified that result (*ibid.*). Judge Cardamone concluded that both the language and the legislative history of the FTAI Act make it "obvious that Congress did not aim to deprive federal courts of jurisdiction over suits like the instant one" (*id.* at A17). And, Judge Cardamone believed, Colombia's interest in its Reservation Laws—in his view the primary factor on which the majority had relied in its comity analysis—was "insufficient to preclude jurisdiction" under two cases in which this Court had "addressed the effect of United States antitrust laws on anticompetitive conduct allegedly aided by foreign protectionist legislation" (*id.* at A20, citing *United States* v. *Sisal Sales Corp.*, 274 U.S. 268 (1927), and *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962)).

DISCUSSION

The decision of the court of appeals manifests some confusion about the scope of the act-of-state doctrine. Nevertheless, because it is not clear to what extent the decision below ultimately rests on the act-of-state doctrine or to what extent that doctrine is implicated by the record or the filings by petitioner in this case, we are not persuaded that this case presents an appropriate occasion for the Court to grant review.[11]

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in formal action by the FMC, petitioner states (Pet. 10-11 n.16) that it led to changes in Colombia's treatment of the reserved cargo. We understand that petitioner now is among the carriers entitled to compete for the cargo reserved to Colombian and affiliated carriers under the Reservation Laws.

[11] In addition to its first three questions, which address generally the propriety of dismissing on act-of-state grounds, petitioner raises two additional questions that, in our view, need not

1. This Court's classic statement of the act-of-state doctrine appears in *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897):

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

More recently, this Court has explained that the act-of-state doctrine "precludes the courts of this country from inquiring into the validity of the public acts [of] a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 401 (1964); see also *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 697 (1976) (opinion of White, J.).

To consider the possible application of the act-of-state doctrine to this case, one must first understand what actions petitioners allege are violations of the antitrust laws. Unfortunately, petitioner's complaint, its briefs, and its petition for a writ of certiorari are less than crystal clear in that regard. The court of appeals viewed

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be reached. Although the court of appeals asserted that respondents' conduct had been "compelled by the foreign government" (Pet. App. A10), the record is devoid of any evidence suggesting foreign sovereign compulsion. Respondents have not raised a foreign sovereign compulsion defense, and the court of appeals did not clearly rest its decision on that factor. Similarly, although the court of appeals characterized respondent Flota as an "agency or instrumentality" of the Colombian government (*id.* at A4), we do not understand the court of appeals to have based its holding on the belief that the acts of Flota should be deemed acts of the foreign sovereign. Accordingly, there is no occasion to determine here whether there is an exception to the act-of-state doctrine, or to foreign sovereign immunity, for commercial enterprises.

this case, at least in part, as a "direct challenge to Colombia's cargo reservation laws" (Pet. App. A6), and petitioner has made statements that tend to support that view (see note 8, *supra*). Insofar as petitioner did contend that such a challenge could be heard by a U.S. antitrust court, the court of appeals properly rejected that contention on act-of-state grounds. But petitioner's lawsuit appears also to challenge actions of respondents that at best were encouraged and approved by the Colombian government [12] and at worst were undertaken without any government involvement at all.[13] We take no position on whether petitioner's allegations state a claim under the antitrust laws, but we do believe that the court of appeals erred to the extent its decision is understood as dismissing those claims in their entirety under the act-of-state doctrine.

Petitioner alleges as antitrust violations some conduct that, if it is illegal under the U.S. antitrust laws, is illegal for reasons that do not call into question the validity of the Reservation Laws or any other public act of a foreign sovereign. Colombia's Reservation Laws in themselves worked no exclusion of petitioner from the LBC trade; petitioner alleges that it was excluded by respondents' conduct. The court of appeals itself noted petitioner's contention that respondents manipulated the Reservation Laws to create a monopoly (Pet. App. A9-A10).

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[12] The formation of any Flota-Andino agreement, for example, was not an act of the Colombian government itself or an act compelled by the Colombian government, although at least one such agreement certainly was approved by the Colombian government and may have been encouraged by the Colombian government.

[13] For example, petitioner alleges that Flota put pressure on Lykes Steamship Company to refuse to carry out an agreement with petitioner that would have entitled petitioner to be treated as an associated carrier allowed to compete for the reserved 50% under the Reservation Laws. None of the filings that we have reviewed gives reason to believe that the Colombian government had anything to do with that alleged action.

It thus appears that the conduct challenged here in fact may not be Colombia's promulgation and implementation of the Reservation Laws, but rather an alleged unlawful private agreement among respondents that excluded petitioner from the Colombian LBC trade.

On that view, Colombia's Reservation Laws are simply part of the context within which the challenged conduct allegedly occurred (see, *e.g.*, *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962); *United States* v. *Sisal Sales Corp.*, 274 U.S. 268 (1927)). And to hold respondents, as private parties, liable on that theory, a court need not question the validity of those laws or any other Colombian sovereign act or even inquire into the motivations or circumstances that may have caused the Colombian government to act as it did; a court need only hold that U.S. antitrust law forbids conduct that the law of another nation may permit. There is nothing particularly unusual about the proposition that a company engaged in a business affecting two jurisdictions must comply with the law of both, and one could readily concede that respondents have complied with valid Colombian laws yet determine that they have not complied with equally valid U.S. laws. A foreign nation's law can be perfectly valid in every sense of the word and yet provide no defense to a claim that a corporate defendant, which took action in compliance with that law but not mandated by that law, breached U.S. laws with which it also had a duty to comply. Accordingly, because petitioner appears to rely in part on claims of this sort, we see no justification at this stage for dismissal of this suit in its entirety under the act-of-state doctrine.

2. One step in the reasoning of the court of appeals was a statement that an "inquiry into the motives of the foreign government" would be required if the case were to proceed (Pet. App. A10). It is not clear why that is so. Neither the court of appeals nor the parties identified either the actors or the actions with respect to which motivation must be determined, or explained why such a

determination was necessary. At bottom, petitioner's theory is that respondents entered into certain anticompetitive agreements and then sought, and received, approval of the agreements from the Colombian government.[14] Although approval of the agreements may be a necessary link in the causal chain between respondents' private conduct and certain of the injuries petitioner alleged, it is undisputed that Colombia would have had no occasion to approve the challenged agreements if respondents had not entered into them. It is not clear that it makes any difference to petitioner's claims what led the Colombian government to enact the Reservation Laws or to approve respondents' agreements; all that matters to the causal chain is that Colombia did approve respondents' agreements. Nor is it clear, even as a matter of Colombian law, that the mere approval of the agreements had the effect of compelling (rather than merely authorizing) any private conduct by respondents or of insulating that conduct from all legal challenge.

If it were true that resolution of petitioner's claims on the merits would require inquiry into the motives of the Colombian government or persons occupying official positions in that government, then a court of appeals decision addressing the application of the act-of-state doctrine in that setting might warrant a grant of certiorari. The courts of appeals have taken different approaches to this issue.[15] In a case in which the plaintiff was harmed di-

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[14] Petitioner may also have alleged that respondents instigated certain other actions by officials of the Colombian government.

[15] The court below relied on its prior opinion in *Hunt* v. *Mobil Oil Corp.*, 550 F.2d 68, cert. denied, 434 U.S. 984 (1977), but *Hunt* was predicated on the court's view that the circumstances of that case were such that an inquiry into motivation necessarily implicated validity. In *Hunt*, an independent oil producer alleged that the concerted activity of other oil producers prevented the plaintiff from reaching certain agreements with the government of Libya, with the result that the Libyan government terminated

rectly by a foreign government's grant of an oil concession to a competing applicant and the private defendant was alleged to have influenced that government action by means of illegal payments to foreign government officials, the Ninth Circuit has suggested that the act-of-state doctrine is applicable when an inquiry into foreign governmental motivation would be required. *Clayco Petroleum Corp* v. *Occidental Petroleum Corp.*, 712 F.2d 404 (1983), cert. denied, 464 U.S. 1040 (1984). In somewhat different circumstances, the Fifth Circuit has held that an inquiry into a foreign government's motivation should not necessarily be treated in the same manner as an inquiry into the validity of its acts for purposes of the act-of-state doctrine, reasoning that "[p]recluding all inquiry into the motivation behind or circumstances surrounding the sovereign act would uselessly thwart legitimate American goals where adjudication would result in no embarrassment to executive department action." *Indus-*

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the plaintiff's right to produce and export crude oil and nationalized its assets. The district court reasoned that the damage complained of resulted directly not from the acts of the defendants, but rather from those of the Libyan government, and that the plaintiff would have to prove that Libya would not have so acted but for defendants' alleged conspiracy. It therefore dismissed on act-of-state grounds. A divided panel of the Second Circuit affirmed, reasoning, on the facts before it, that the necessary inquiry into the motivation of Libyan action "inevitably involves its validity" (550 F.2d at 77), because the validity under international law of measures taken against the rights and property of foreign nationals depends on the reasons for those measures (*ibid.*). Thus, if this were a case in which the success of the plaintiff's antitrust claims depended on the motivation or causes underlying the actions of the Colombian government, but in a manner that did not undermine the validity of those actions, *Hunt* would not control. As we have observed, however, we do not see petitioner's allegations as calling the motivation of the Colombian government into question any more than they call into question the validity of that government's actions. Moreover, here, unlike in *Hunt*, the alleged injury did not result directly from the action of the foreign government itself.

trial Inv. Dev. Corp. v. *Mitsui & Co.*, 594 F.2d 48, 55 (1979), cert. denied, 445 U.S. 903 (1980); see *Clayco*, 712 F.2d at 407 (distinguishing *Mitsui* as a case involving a challenge to private conduct undertaken against the background of foreign law).

Most recently, the Third Circuit in *Environmental Tectonics* v. *W.S. Kirkpatrick, Inc.*, 847 F.2d 1052 (1988), petition for cert. pending, No. 87-2066, aligned itself with the Fifth Circuit, reversing the dismissal of a complaint in a case where the district court had concluded that the act-of-state doctrine precluded judicial inquiry into the motivation of a foreign sovereign act—in that case, as in *Clayco*, based on a claim that the responsible officials of the foreign government acted as they did because they accepted bribes.[16] The Third Circuit explained that the act-of-state doctrine applies to inquiries into "the validity of a foreign state's governmental acts in regard to matters within that country's borders" (*id.* at 1057-1058), specifically criticized what it regarded as the Ninth Circuit's "expansive application of the act of state doctrine" (*id.* at 1060) in *Clayco*, and quoted with approval a letter sent by the Legal Adviser, United States Department of State, to the district court in *Environmental Tectonics*, stating that the act-of-state doctrine "'only precludes judicial questioning of the *validity* or *legality* of foreign government actions.'" (*id.* at 1061 (emphasis in original)). Because the Third Circuit believed that adjudicating the claims before the court in that case "would have required at most an inquiry only into the motivations behind, rather than the legality of,

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[16] The Third Circuit did not hold that courts may always inquire into the motivations of foreign governments, indicating that judicial abstention may be appropriate when "a defendant come[s] forward with proof that adjudication of a plaintiff's claim poses a demonstrable, not a speculative, threat to the conduct of foreign relations by the political branches of the United States government" (847 F.2d at 1061).

the foreign government's acts" (*id.* at 1062), it held that the act-of-state doctrine did not require dismissal.[17]

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[17] The diversity of views among the circuits may result from the uncertain status of the early exposition of the act-of-state doctrine in *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347 (1909), as it relates to anticompetitive schemes that depend, at least in part, on procurement of a foreign sovereign act. See *Hunt*, 550 F.2d at 73-75 (discussing *American Banana*); *Clayco*, 712 F.2d at 407 (citing *American Banana*). In *American Banana*, the Court upheld dismissal of an antitrust complaint that alleged that the defendant had caused the government of Costa Rica to seize the plaintiff's property for the purpose of eliminating it as a competitor. The Court held that the antitrust laws do not reach conduct occurring outside the United States (213 U.S. at 357), a holding that has been rejected by subsequent decisions of this Court. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. at 704. The Court further supported its decision by reliance on act-of-state principles (213 U.S. at 358):

> [I]t is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. It does not, and foreign courts cannot, admit that the influences were improper or the results bad. It makes the persuasion lawful by its own act.

If this language were given an expansive reading, it would insulate from judicial scrutiny anticompetitive schemes in which the procurement of a foreign sovereign act played a part, even though the case may be resolved under the antitrust laws without questioning the sovereign act under international law or otherwise and the foreign sovereign act itself was not even the immediate cause of the injury (as in *American Banana*). That reading of *American Banana*, however, would be inconsistent with this Court's subsequent decisions in *United States* v. *Sisal Sales Corp.*, *supra* (upholding complaint alleging that defendants had conspired in the United States to monopolize and restrain trade by, among other things, securing favorable legislation in Mexico), and *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, *supra* (upholding antitrust complaint alleging that private defendants had conspired in the United States to establish an exclusionary customer allocation program for sales of vanadium in Canada that had been instituted and controlled by an agency of the Canadian government). This Court has not, however, qualified this aspect of the

The United States expressed the view in response to the Court's invitations in *Hunt* and *Mitsui* that the act-of-state doctrine was not applicable in those cases simply because the suits may have involved inquiry into the motives of a foreign government, but the Court did not grant review. See Brief for the United States as Amicus Curiae, *Mitsui & Co.* v. *Industrial Inv. Dev. Corp.*, 445 U.S. 903 (1980) (denying certiorari) (No. 79-552); Brief for the United States as Amicus Curiae, *Hunt* v. *Mobil Oil Corp.*, 434 U.S. 984 (1977) (denying certiorari) (No. 76-1403).[18] In the present case, it appears that nothing ultimately turns on the motivation of a foreign

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holding of *American Banana* on the facts there presented, and it was cited in *Sabbatino*, 376 U.S. at 416, as a case "directly or peripherally" involving the act-of-state doctrine.

[18] The position that the United States took in this Court in *Hunt* and *Mitsui*, and that the Legal Adviser took in the district court in *Environmental Tectonics*, was that the act-of-state doctrine is an improper basis for dismissal in "motivation" cases, not that such cases invariably should proceed to adjudication on the merits. Putting the act-of-state doctrine aside, the political question doctrine might justify judicial abstention in cases that could cause intense embarrassment to a foreign state or improperly inject the courts into the formation or execution of the Nation's foreign policy. See *Baker* v. *Carr*, 369 U.S. 186, 211-213, 217 (1962); *Goldwater* v. *Carter*, 444 U.S. 996, 1003-1004 (1979) (Rehnquist, J., concurring in the judgment); *Sharon* v. *Time, Inc.*, 599 F. Supp. 538, 547-553 (S.D.N.Y. 1984). Adjudication of a complaint implicating to some extent the conduct of a foreign government may also raise substantial problems of proof. But the possibility of such problems is not a sufficient reason to prevent the plaintiff from attempting to present competent evidence. As this Court noted in *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 697, 700-701 (1962), the jury may be permitted to draw appropriate inferences concerning causation from circumstantial evidence. Wide-ranging discovery against foreign officials may also have implications for foreign relations. This possibility, however, may simply call for appropriate judicial sensitivity in limiting discovery requests rather than for dismissal. See *Environmental Tectonics*, 847 F.2d at 1062 n.11.

sovereign act, and thus—although the court of appeals addressed the issue—it is unlikely that this Court would have occasion to do so if certiorari were granted. Accordingly, although the conflict among the circuits on the issue appears to persist, this case is not an appropriate vehicle for its resolution.

3. Given that motivation and validity of foreign actions do not appear to be truly implicated by the decision below, we see no issue in this case that calls for resolution by this Court. To be sure, there are in our view errors in the decision below, but those errors consist largely of case-specific misunderstandings of the degree to which petitioner's claims depend on foreign governmental, rather than private, action. *E.g.*, Pet. App. A10 ("O.N.E.'s allegations make clear that its antitrust suit is premised on contentions that it was harmed by acts and motivations of a foreign sovereign which the district court would be called on to examine and pass judgment on."); *id.* at A11 ("O.N.E.'s 'antitrust' claims reflect dissatisfaction with Columbia's cargo reservation laws, not with appellees' space chartering agreements.").[19] No important and unsettled issue of law would be resolved if this Court were merely to grant certiorari, construe petitioner's allegations differently, and remand on that basis. Nor, given its purported limitation to cases in which the plaintiff's challenge calls on the court to pass judgment on a foreign sovereign act, is it likely that the decision below will lead other courts to apply the act-of-state doctrine in situations in which the complaint can be adjudicated without questioning the validity of foreign governmental action.

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[19] The court of appeals was not without basis for believing that petitioner was expressing dissatisfaction with Colombia's cargo reservation laws and was improperly seeking to air that dissatisfaction by means of an antitrust suit under U.S. law (see note 8, *supra*). The Court erred, however, in suggesting that petitioner's lawsuit was not also a challenge to respondents' space-chartering agreements.

Moreover, there is some doubt whether the court of appeals decided the case under the act-of-state doctrine at all. The district court dismissed on grounds of international comity, without reference to the act-of-state doctrine, and the court of appeals affirmed without disavowing the district court's reasoning. The dissenting judge plainly understood the majority to have based its decision on principles of international comity, construed in light of act-of-state principles (Pet. App. A14, A18-A24), and respondents apparently share that understanding (Br. in Opp. 2). Although we do not endorse the district court's comity analysis, it is not inconceivable that the limited effects of respondents' actions within the United States and other factors would combine to justify dismissal based on a lack of jurisdiction. There has, however, been little development in the record of the facts that would support or undermine such a dismissal. As is the case with the act-of-state issues, "[r]esolution here of" such issues "can await a day when the issue is posed less abstractly." *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 87-1350

In the

Supreme Court of the United States

OCTOBER TERM 1988

O.N.E. SHIPPING, LTD.,

Petitioner,

against

FLOTA MERCANTE GRANCOLOMBIANA, S.A., ANDINO CHEMICAL SHIPPING, INC., and MARITIMA TRANSLIGRA, S.A.,

Respondents,

PETITIONER'S RESPONSE TO BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

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Statement

As *amicus* recognizes, petitioner O.N.E. does not challenge Colombia's laws and regulations. These are simply part of the context within which the challenged conduct occurred. Petitioner claims a broader unlawful conspiracy to raise rates and exclude competitors. This broader unlawful scheme antedated Colombian approval of the 1973 and 1976 Agreements and continued after those Agreements.

Discussion

The district court dismissed petitioner's action on the ground that it had "no jurisdiction . . . because of principles of [international] comity" (Pet. App. A29), stating among other things that Colombian interests outweighed United States interests. The district court appeared to find, however, that petitioner adequately alleged a direct, substantial and reasonably foreseeable effect on U.S. export or

domestic commerce as required under the Foreign Trade Antitrust Improvements Act of 1982 (FTIA) (15 U.S.C. § 6a). Petitioner argued on appeal that, once the requisite effects were alleged, it was improper to decline jurisdiction based on a "balancing" of U.S. and foreign interests in favor of the latter. The circuit court did not address the FTIA issue,[1] but dismissed the action on the basis of the Colombian laws and regulations and the policies underlying them. In so doing, the circuit court referred to comity and the act of state doctrine. Thus the circuit court's holding is more in the nature of a defense or immunity separate from the threshold issue of subject matter jurisdiction.

The United States as *amicus* agrees that there were several errors in the decision below and that petitioner's claims should not have been dismissed. The *amicus*'s further conclusion that the case is inappropriate for certiorari review is unpersuasive, however. The circuit court below decided important questions of law, contrary to this Court's precedent, concerning a common and significant situation—business conduct involving foreign government laws or policies. The circuit court decision effectively creates a new immunity from the antitrust laws for private firm conduct simply on a finding that the antitrust claim implicates foreign laws or policies, even where significant U.S. antitrust and maritime policies would be furthered by the taking of jurisdiction.

As *amicus* states, the circuit court's immunity doctrine is contrary to this Court's decision in *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927) and *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). Those decisions instruct that an antitrust claim does not fail merely because the challenged conduct involves foreign laws and policies; mere compliance with foreign law does not preclude antitrust liability. These decisions and the

[1] The dissenting judge expressly upheld jurisdiction and petitioner's standing under the FTIA.

domestic state action decisions[2] express the concern that private firms not avoid antitrust sanction by cloaking essentially private unlawful schemes under government involvement. The circuit court disregards that concern. As a former Legal Adviser to the State Department points out, "the court suggests that if a lawsuit directly implicates a foreign government's motives or actions, jurisdiction should not be exercised no matter what the strength of U.S. interests in pursuing the suit."[3]

The decision below has wide precedential scope and will not be limited to the pleadings or facts of the present case as *amicus* suggests. The circuit court formulated the immunity in absolute terms, *i.e.*, courts should dismiss claims where foreign laws or policies are implicated. The circuit court did not limit the immunity to antitrust claims that merely challenge the validity of foreign laws, although the circuit court misinterpreted petitioner's claims to that effect. The decision below will lead other courts to dismiss antitrust claims simply on a finding or assertion that foreign laws or policies are involved with no weight given to relevant U.S. laws and policies or the *Midcal*

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[2] *E.g., Southern Motor Carriers Rate Conference v. United States,* 471 U.S. 48 (1985); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,* 445 U.S. 97 (1980).

[3] Leigh, *Judicial Decisions,* 82 Am. J. Int'l L. 351, 353 (1988).

Neither *Continental Ore* nor *Sisal Sales* is distinguishable, as *amicus* implicitly concludes. As here, in both cases a broader conspiracy or monopolistic scheme was alleged and effects on U.S. commerce were shown or alleged. The location of the act of conspiring and the nationality of the parties are not determinative and do not distinguish *Sisal Sales* from the instant case. The important U.S. antitrust and maritime interests at stake in the case at bar are no less important than the antitrust interests at stake in *Sisal Sales* and *Continental Ore.* The Colombian legislation is no more the gravamen of petitioner's complaint than it was in *Sisal Sales.* Colombia's laws and regulations, like the Mexican and Canadian laws and regulations in *Sisal Sales* and *Continental Ore,* are simply part of the context within which the challenged conduct occurred. Indeed, the discriminatory legislation in *Sisal Sales* was more intimately involved in the antitrust claims than the Colombian laws and regulations.

concern, thus eroding this Court's decisions in *Sisal Sales, Continental Ore* and *Midcal.*

The damaging precedential effect of the decision below can be seen already in the one opinion to rely on it. A district court interpreted the circuit court decision below to permit a court to decline jurisdiction "under principles of international comity" even where the jurisdictional requirements of the FTIA are met. *McElderry v. Cathay Pacific Airways, Ltd.*, 678 F. Supp. 1071, 1078 (S.D.N.Y. 1988).[4]

Any ambiguity in the circuit court decision below concerns the basis for its new foreign immunity defense. This is secondary to the issue whether that immunity is contrary to Supreme Court precedent. Doubts about the circuit court's rationale makes certiorari review even more appropriate.

The circuit court's foreign immunity defense is not supported on "comity" or act of state doctrine grounds.

Dismissal of antitrust claims simply on the assertion that foreign government laws or policies are involved, even though important U.S. antitrust and maritime policies would be furthered by the taking of jurisdiction, is a perverse misuse of the concept of comity. Dismissal is inconsistent with this Court's admonition that comity does not require deference to foreign laws and policies that are contrary to the forum state's significant public policies.[5]

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[4] The district court cited the decision below for the proposition that where "there is a direct conflict between the United States [and the foreign government], the continuance of which could clearly exacerbate the stated differences between the two countries, the proper course seems clearly to be to 'avoid the unnecessary irritant of a private antitrust action' by declining jurisdiction." 678 F. Supp. at 1079. The same court also relied on the decision below to dismiss antitrust claims on the basis of the act of state doctrine.

[5] *See, Hilton v. Guyot*, 159 U.S. 113, 164-65 (1895).

The extreme position taken in the decision below under which dispositive deference is accorded foreign government interests conflicts with the case law of other circuit courts. The decision below conflicts with the D.C. Circuit's decision in *Laker* holding that U.S. courts may not decline antitrust jurisdiction on the ground that foreign interests are deemed to outweigh U.S. interests.[6] Moreover, the decision below failed to engage in any meaningful balancing analysis and thus conflicts with circuit court decisions (*see, e.g., Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976)) that call for a "balancing" of U.S. and foreign interests. Assuming *arguendo* that such a balancing is appropriate, the circuit court decision should be reversed because it failed to balance at all.

The decision below is also in error to the extent that it relies on the possible adverse effect on U.S. foreign relations should jurisdiction be taken. Whether or not this is an appropriate factor in general,[7] dismissal is unjustified where as here there is no evidence of such an effect beyond the foreign laws and policies themselves and where as here the Executive has foregone several opportunities to advise the court that the suit is adversely affecting the United States' conduct of foreign relations.

The act of state doctrine also fails to support the circuit court's foreign immunity defense. As the *amicus* concludes, there is no basis whatsoever for application of the act of state doctrine in the present case. Petitioner is not challenging, directly or indirectly, the validity of the Colom-

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[6] *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984).

[7] For example, if courts consider immediate foreign policy concerns, inconsistent and *ad hoc* rulings which may depend to an unacceptable degree on case-specific foreign policy concerns will result. *See*, 1 J. Atwood & K. Brewster, *Antitrust and American Business Abroad* § 6.18 (2d ed. 1981); 1 B. Hawk, *United States, Common Market and International Antitrust* 151 (2d ed. 1987).

bian laws and regulations; there is no Colombian act of state at issue. Moreover, there is no evidence with respect to any possible adverse effect on foreign relations.

Amicus argues that the decision below does not squarely raise the question whether the act of state doctrine precludes inquiry into foreign government motivation as well as validity of foreign acts of state. It is true that petitioner's claims do not require an inquiry into the motivations of the Colombian government and that petitioner's injury did not result directly from the action of the Colombian government. However, the circuit court's foreign immunity defense requires courts to identify and evaluate asserted foreign interests and policies. Thus the Colombian government's motivations are relevant in that the circuit court relies on Colombian policies and the reasons underlying the cargo reservation laws to dismiss the antitrust claims. Of course this reliance itself contradicts the circuit court's statement that the act of state doctrine precludes inquiry into the foreign state's "policies, and the underlying reasons and motivations for the actions of the foreign government." (Pet. App. A8) This internal contradiction reveals further the lack of a principled basis for the circuit court's foreign immunity defense.[8]

Because the decision below does not deal with the validity-motivation issue in a narrow sense, the case is a more appropriate vehicle for this Court to clarify the status of the act of state doctrine in antitrust cases, *i.e.*, "as it relates to anticompetitive schemes that depend, at least in part, on procurement of a foreign sovereign act." *Amicus* Brief at p. 16 n. 17.[9]

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[8] The circuit court's reliance on *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir. 1977), *cert. denied*, 434 U.S. 984 (1977), together with its baseless and cryptic references to the foreign sovereign compulsion defense and the Foreign Sovereign Immunities Act illustrate further the flawed rationale of the newly created foreign immunity defense.

[9] The act of state doctrine was raised for the first time only on

(*footnote continued on following page*)

The decision constitutes reversible error where it suggests that the foreign sovereign compulsion defense precludes an antitrust claim even where there is no evidence of actual compulsion. This is squarely contrary to the case law which requires proof of actual compulsion; acquiescence, approval or delegation of authority is not sufficient.[10] The foreign sovereign compulsion defense's policy consideration of fairness to the compelled party and the *Sisal Sales-Midcal* concern require actual compulsion.

Important and unsettled issues of law would be resolved if the Court granted certiorari, construed petitioner's allegations differently and remanded on that basis. The decision below declares in absolute terms a legal standard of antitrust immunity. Further facts are not necessary to review for error such a legal standard.[11] Even if the Court

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(footnote continued from preceding page)

appeal by defendant Flota. The circuit court should not have invoked the doctrine until the district court heard the views of the Executive, entertained fuller arguments from the parties and permitted discovery. At the minimum, the issue of the act of state doctrine should have been remanded to the district court.

[10] *See, e.g., Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976); *Interamerican Ref. Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970). *Cf., Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962).

[11] This case, unlike the case of *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180 (70 S.Ct. 710) 1959, will definitely be affected by resolution of the issue for which certiorari would be granted. In *The Monrosa, supra,* the Court, after realizing that the *in rem* action would continue in the United States courts even though the *in personam* action might be relegated to the courts of Italy by reason of a forum selection clause, held that a determination of the issue whether a bill of lading clause could validly transfer an *in personam* action was only abstractly presented since the parties would achieve the same result by continuing to pursue their *in rem* action against the vessel in the United States. That case is patently not analogous to the situation here where a determination of the issues will have a definite effect upon the continued prosecution of the litigation.

were to review the circuit court's immunity defense as an overly broad rule, remand would permit development of further facts and legal arguments relevant to drawing the line under a more nuanced standard to determine antitrust liability for business conduct involving foreign laws and policies.[12]

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[12] The *amicus*'s suggestion that "it is not inconceivable that the limited effect of respondents' actions within the United States and other factors would combine to justify dismissal based on a lack of jurisdiction" (*Amicus* Brief at p. 19) is unpersuasive. As Judge Cardomone dissenting rightly concludes, subject matter jurisdiction exists under the FTIA given the direct, substantial and reasonably foreseeable effects of respondents' scheme on U.S. commerce. Even if the Court adopted a more nuanced jurisdictional test (for example, requiring a "balancing" of U.S. and foreign interests and consideration of factors linking the claims to the United States such as the location of the challenged conduct and its effects), the appropriate remedy would be remand for further factual development.

Furthermore, *amicus* is incorrect in its understanding that petitioner has rights to carry cargos reserved to Colombian or associated carriers (See *Amicus* Brief p. 8 n. 10). Except to the extent that enforcement of the Reservation Laws can be waived in specific instances, petitioner did not obtain any such rights as a result of its FMC proceeding under § 19 of the Merchant Marine Act (46 U.S.C. § 876).

CONCLUSION

The petition for a writ of certiorari should be granted.

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